TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 55

THE PEP BOYS, MANNY, MOE & JACK OF CALIFORNIA, APPELLANTS,

vs.

PYROIL SALES COMPANY, INC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED MAY 13, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 55

THE PEP BOYS, MANNY, MOE & JACK OF CALIFORNIA, APPELLANTS,

vs.

PYROIL SALES COMPANY, INC.

APPEAL FROM THF SUPREME COURT OF THE STATE OF CALIFORNIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 17, 1936.
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[fol. 1]

IN SUPERIOR COURT OF LOS ANGELES COUNTY

No. 372896

PYROIL SALES COMPANY, INC., a Corporation, Plaintiff,

vs.

THE PEP BOYS, MANNY, MOE & JACK, OF CALIFORNIA, a Corporation, Defendant

COMPLAINT FOR RESTRAINING ORDER AND INJUNCTION—Filed April 26, 1934

The petition of plaintiff, Pyroil Sales Company, Inc., a corporation, respectfully shows:

I

That petitioner is, and at all times herein mentioned, was, a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the County of Los Angeles, state of California.

II

That the defendant is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the County of Los Angeles, State of California.

III

That the petitioner, by virtue of contracts with the manufacturer and distributor, has the sole right to sell and dis- [fol. 2] tribute in southern California, including the Counties of Los Angeles, Orange, San Diego, Imperial, Riverside, San Bernardino, Santa Barbara and Ventura, a commodity named and designated as Pyroil, which bears distinctive trademarks, names, labels and copyrights, together with the good will pertaining thereto and the exclusive

right to the use, in said counties, of said trademarks, names, labels and copyrights.

IV

That Pyroil is manufactured, patented and guaranteed by the Pyroil Company, La Crosse, Wisconsin, under United States Patent Numbers 1877668 and 1879874, and that Pyroil is a Heat-Proof Lubrication Process which is a highly specialized, concentrated lubricant embodying an effective carbon solvent and a new patent-protected liquefied graphite, soluble in gasoline in its liquid form, yet impervious to heat or wet-gas dilution when rubbed into the pores of the bearing metal surfaces, and composed only of the finest lubricating elements.

V

That the said Pyroil products for several years have been a well established commodity through advertising in national publications, such as The Saturday Evening Post, Time, Maclean's (Canada), the radio, automobile races, dryrun tests, and many other means;

That the said Pyroil products enjoy and have enjoyed [fol. 3] for several years good reputation among dealers, retailers and consumers.

VI

That the manufacturer, Pyroil Company, of LaCrosse, Wisconsin, ships its Pyroil products from its factories to California, where it warehouses said products and shipments in bonded warehouses, and that plaintiff obtains its Pyroil products from such bonded warehouses and in turn warehouses the same at its local points of distribution and marketing.

VII

That there has developed in the automobile accessory trade in California a practice of cutting the price of well established and advertised commodities, well known to the public, and identified under distinctive trademarks, names, labels and copyrights;

That such products at such cut prices were and are used as so-called "leaders" or "loss leaders" to attract people and prospective purchasers into automobile accessory es-

tablishments, depending upon those so attracted to make purchases of other goods and similar articles which yield sufficiently large profits to make up for losses involved in such cut prices.

VIII

That to remedy this evil, the State Legislature of California in 1931 passed an act entitled, "An Act to protect trade mark owners, distributors and the public against in-
[fol. 4] jurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name";

That said Act was amended in 1933 by the addition of a section numbered "1½", which forbids any person from

"Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person aggrieved."

IX

That plaintiff, to protect itself and the public against the injurious and uneconomic practices recognized by said Act, and the amendment thereof, adopted a system of doing business which consisted of entering into contracts with dealers in southern California and the counties herein mentioned, obligating the latter to sell plaintiff's Pyroil products only to consumers at specified prices;

That the prices so stipulated in such contracts are, in fact, fair and reasonable, and that practically all dealers and retailers in southern California have executed such contracts with plaintiff;

That as a result of such contracts and method of merchandising, plaintiff enjoys a reasonable profit in the sale of its products, immunity from injurious and uneconomic price cutting, unobstructed distribution of its products, and the public has benefited through reasonable prices and high
[fol. 5] quality enabled by consequent volume production;

That as a result of such method of distribution and merchandising, dealers in said products obtain a reasonable compensation for their services;

That plaintiff refuses to sell its products to dealers and retailers who do not execute such contracts.

X

That the defendant, operating six (6) retail stores in the cities of Los Angeles, Glendale, Huntington Park and Long Beach, County of Los Angeles, State of California, with the purpose of interfering with, and disrupting, plaintiff's said contracts and business, have knowingly and wilfully advertised, offered for sale and sold said Pyroil products at less than the prices stipulated in said contracts;

That in so doing, the defendant knew of the said contracts, and that previously to such advertising, offering for sale and selling by defendant, it has always had an opportunity to purchase said products on the same terms and conditions as other retailers and dealers, but had not done so, and obtained said products in ways unknown to plaintiff and against plaintiff's will.

XI

That the prices of Pyroil products in California, whether "Pyroil A", "Pyroil B", or "Pyroil W", established by the manufacturer, are as follows:

$1.00 in lithographed and trademarked Pint containers,
[fol. 6] 1.75 in lithographed and trademarked Quart containers,
6.00 in lithographed and trademarked Gallon containers.

XII

That on the 19th day of April, 1934, in a daily newspaper in circulation in the City and County and Los Angeles known as the Los Angeles Evening Herald and Express, defendant advertised "Genuine Pyroil" for sale at its six retail stores in Los Angeles County, at the following prices:

"49¢—1-Pint Can,
89¢—1-Quart Can,"

and did thereafter, and until the 23rd day of April, 1934, offer for sale and sell "Genuine Pyroil" in the manufacturer's original and sealed containers, at its said stores and for the prices so advertised in the Los Angeles Evening

Herald and Express in its various editions of April 19, 1934.

XIII

That on the 23d day of April, 1934, defendant changed its prices, offered for sale and sold "Genuine Pyroil" in the manufacturer's original and sealed containers, at its said stores, as follows:

"69¢—1-Pint Can,
$1.19 1-Quart Can,"

and has continued and is continuing to do so at the time of the filing of this petition.

XIV

That the said wilful acts of the defendant have induced, [fol. 7] coerced and forced other dealers and retailers who have executed contracts with plaintiff, to cancel and threaten to cancel the same, and to refuse to accept further deliveries of Pyroil from plaintiff;

That a further consequence of the said acts of the defendant is that the public is induced to believed the Pyroil products are not worth the prices at which they are nationally advertised and fixed by the manufacturers, and other retailers and dealers cannot market the same at said fixed and advertised prices and threaten to discontinue their sale;

That the warehousing, distribution and marketing of Pyroil is the sole and only business of plaintiff;

That the continuance and marketing of Pyroil by the defendant in the style and manner hereinbefore set forth, will produce great and irreparable injury to plaintiff;

That it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief to plaintiff for loss of sales, destruction of plaintiff's business, and the good will pertaining thereto;

That pecuniary compensation would not afford adequate relief to plaintiff and that restraint is necessary to prevent multiplicity of judicial proceedings;

That the wrongs complained of imminently peril and immediately threaten devastation of plaintiff's business, destruction of its good will, and multiple breaches, violations [fol. 8] and cancellations of its said contracts;

That plaintiff has suffered and will suffer great and irreparable injury for which there is no adequate remedy at law.

XV

That each and all of the acts complained of and herein sought to be enjoined, as hereinafter prayed for, are continuous and continuing in their nature, and great and irreparable injury will result to plaintiff, and the plaintiff will continue to suffer great and irreparable injury as aforesaid unless said defendant be permanently enjoined and restrained from the continuance of the said acts.

Wherefore, plaintiff and petitioner prays:

(1) That the defendant, its agents, officers, attorneys, employees and all persons acting in aid of or in conjunction with it, or any of them, be temporarily restrained immediately and that they be permanently enjoined after a hearing upon the merits of the matter, from, in any manner or by any means, direct or indirect,

(a) Advertising, offering for sale and selling "Genuine Pyroil" and any and all Pyroil products in the Counties of Los Angeles, Orange, San Diego, Imperial, Riverside, San Bernardino, Santa Barbara and Ventura, except at the prices established by the plaintiff and fixed by the manufacturer, namely, $1.00 in Pint containers, $1.75 in Quart [fol. 9] containers and $6.00 in Gallon containers;

(b) Advertising, offering for sale and selling "Genuine Pyroil", and any and all Pyroil products, in said Counties, except in the original, lithographed and sealed containers, bearing the trademark, label, name and copyright of the manufacturer;

(c) Interfering with the business of the plaintiff in the said Counties in any manner contrary to the law of the State of California;

2. That upon the filing of this complaint this Court make and enter its order requiring the defendant and respondent to appear at a time and place therein to be specified then and there to show cause, if any they have, why they should not be enjoined during the pendency of this action from the commission of any of the acts set forth in subparagraphs a, b and c of Paragraph 1 of this prayer;

3. That plaintiff and petitioner have such other and further relief as may be just and equitable, together with its costs herein expended.

John C. Mead, Attorney for Petitioner.

[File endorsement omitted.]

[fol. 10] *Duly sworn to by A. F. H. Payne. Jurat omitted in printing.*

[fol. 11] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

DEMURRER—Filed May 2, 1934

Defendant above-named demurs to the complaint on file herein as follows:

II

That certain act of the legislature of the state of California entitled, "An act to protect trademark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name," commonly known as the "Fair Trade Act", under and by virtue of the provisions of which said act the within action is sought to be maintained, is void and unconstitutional in that said act is contrary to and in violation of section 1 of Article XIV of the Amendments to the Constitution of the United States, and of sections 11 and 13 of Article I and [fols. 12 & 13] sections 24 and 25 of Article IV of the Constitution of the State of California.

[fol. 14] Wherefore, defendant prays judgment that plaintiff take nothing against it by reason of said complaint, that the same be dismissed, and that defendant have judgment for its costs incurred herein.

Loeb, Walker and Loeb, Attorneys for Defendant.

[fols. 15 & 16] (Endorsed:) No. 372896. Demurrer. Received copy of the within Demurrer this 2 day of May, 1934, John C. Mead, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 17] IN SUPERIOR COURT OF LOS ANGELES COUNTY

No. 372,896

PYROIL SALES COMPANY, INC., a Corporation, Plaintiff,

vs.

THE PEP BOYS, MANNY, MOE & JACK, OF CALIFORNIA (a Corporation), Defendant

JUDGMENT—Filed July 13, 1934

This matter came on regularly to be heard in Department 34 of the above-entitled Court before the Honorable Emmet H. Wilson, judge presiding, upon an order to defendant herein to show cause why a certain temporary restraining order should not be continued in force pending the within action, and upon the demurrer of defendant to the complaint on file herein. Plaintiff appeared by its attorney, John C. Mead, Esq. and Messrs. Travers, Landels, Weigel and Crocker, amicus curiæ on behalf of plaintiff. Defendant appeared by its attorneys, Messrs. Loeb, Walker and Loeb and by Harry J. Miller, Esq., amicus curiæ on behalf of defendant. Affidavits in support and in opposition to said order to show cause were duly filed and read, and the matter having been duly argued and submitted to the Court for its decision and the Court having duly made an order herein dissolving said temporary restraining order, denying a preliminary injunction and sustaining defendant's [fols. 18-25] demurrer without leave to amend, and plaintiff not having requested leave to amend, Now, Therefore,

It is Ordered, Adjudged and Decreed that plaintiff take nothing by reason of its said complaint on file herein and that the same be and it is hereby dismissed;

It is Further Ordered, Adjudged and Decreed Hereby that defendant have and recover of and from plaintiff its costs incurred herein, which said costs are hereby taxed in the sum of $—.

Dated July 13, 1934.

Emmet H. Wilson, Judge.

[fol. 26] IN SUPREME COURT OF CALIFORNIA

L. A. No. 14954

PYROIL SALES COMPANY, INC. (a Corporation), Plaintiff and Appellant,

v.

THE PEP BOYS, MANNY, MOE & JACK, OF CALIFORNIA (a Corporation), Defendants and Respondents

OPINION—Filed February 28, 1936

By the COURT:

By stipulation of counsel and order of court, the above-entitled cause was ordered submitted, and to be decided concurrently with Max Factor & Co. et al. v. Kunsman, L. A. No. 14662, decision in which cause has been this day filed.

The appeal here, as in the Factor case, is by the plaintiff from a judgment of dismissal entered after demurrer to the complaint sustained without leave to amend. Although not as extensive in its allegations as the complaint in the Factor case, the complaint is sufficient to raise the same general question of the constitutionality of the 1933 amendment to the "Fair Trade Act" (Stats. 1931, p. 583; Stats. 1933, p. 793). Plaintiff herein seeks an injunction pursuant to the provisions of the act, restraining the defendants from selling Pyroil, a branded and trade-marked article, at retail prices lower than those sought to be maintained by the plaintiff. As in the Factor case, defendants [fol. 27] have not bound themselves by any form of contract to resell the commodity at any specified price, but an obligation to so resell is sought by the plaintiff to be imposed on defendants (by the application of section 1½ of the Fair Trade Act—amendment of 1933) by virtue of the fact that other dealers have agreed with plaintiff not to resell at less than certain prices.

As the questions on appeal are identical in the two actions, the decision in the Factor case is decisive of the general question on appeal in this case. Because of that fact, we do not deem it necessary to consider certain specifications urged in the demurrer that the complaint was

uncertain, ambiguous and unintelligible. Therefore, on the authority of the decision in Max Factor & Co. et al. v. Kunsman, this day filed, the judgment herein is reversed.

Mr. Justice Shenk and Mr. Justice Thompson dissent. (See their opinions filed in Max Factor & Co. et al. v. Kunsman, L. A. No. 14662, filed today.)

[File endorsement omitted.]

[fols. 28-82] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ORDER DENYING REHEARING AND MODIFYING JUDGMENT—Filed March 26, 1936

By the COURT:

The petition for a rehearing herein is denied.

The judgment heretofore entered herein is modified to read as follows: "Therefore, on the authority of the decision in Max Factor & Co. v. Kunsman, L. A. No. 14662, this day filed, the judgment herein is reversed, and it is ordered that the trial court enter judgment in the within cause in favor of appellant as prayed.

Waste, C. J.

Dated March 26, 1936.

[File endorsement omitted.]

[fol. 83] [File endorsement omitted]

[fol. 84] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed April 8, 1936

In connection with its Petition for Allowance of Appeal, filed herewith, defendant The Pep Boys, Manny, Moe & Jack of California, by its attorneys, respectfully presents and files its assignment of errors, upon which it will rely in

the prosecution of its appeal from the judgment of the Supreme Court of the State of California, made and entered herein on February 28, 1936, and modified on March 26, 1936, to-wit:

1. The Supreme Court of the State of California erred in reversing the judgment of the Superior Court of the State of California, in and for the county of Los Angeles, dismissing the complaint herein.

2. Said Supreme Court erred in holding that section 1½ of the Fair Trade Act of the State of California [Cal. Stats. 1933, p. 793] was not repugnant to Article XIV of Amend-
[fol. 85] ments to the Constitution of the United States and did not deny due process of law to said defendant.

3. Said Supreme Court erred in holding that said Fair Trade Act did not deny to defendant the equal protection of the laws within the meaning of Article XIV of Amendments to the Constitution of the United States.

Wherefore, said defendant prays that the judgment of the Supreme Court of the State of California, hereinabove mentioned, be reversed.

Dated April 8, 1936.

Loeb, Walker and Loeb, by Herman F. Selvin, Attorneys for defendant.

[fol. 86] [File endorsement omitted.]

[fols. 87-176] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ORDER ALLOWING APPEAL AND SUPERSEDEAS—Filed April 8, 1936

Good cause therefor appearing,

It is ordered that defendant The Pep Boys, Manny, Moe & Jack of California, a corporation, be and it hereby is granted leave to appeal, to the Supreme Court of the United States, from the judgment of the Supreme Court of the

State of California made and entered herein on February 28, 1936 and modified on March 26, 1936.

It is further ordered that said defendant deposit with the Clerk of this Court its undertaking with sufficient security, in the sum of $500.00, that it will W.H.W. prosecute its appeal to effect and answer all costs and damages that said appeal imposes on plaintiff if said defendant fail to make its plea good, said undertaking to operate as a supersedeas.

Dated April 8, 1936.

William H. Waste, Chief Justice of the Supreme Court of the State of California.

[fol. 177] IN SUPREME COURT OF CALIFORNIA, BANK

Los Angeles

No. 14954

On Appeal from the Superior Court in and for the County of Los Angeles

Superior Court #372,897

PYROIL SALES COMPANY, INC., (a Corp.), Plaintiff-Appellant;

vs.

THE PEP BOYS, MANNY, MOE & JACK, OF CALIFORNIA (a Corp.), Defendants, Respondents

JUDGMENT—March 26, 1936

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is ordered, adjudged, and decreed by the Court that the Judgment of the Superior Court in and for the County of Los Angeles in the above entitled cause, be and the same is hereby reversed, and it is ordered that the trial court enter judgment in the within cause in favor of appellant as prayed. Appellant to recover their costs on appeal.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 178] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 179] SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED ON AND PARTS OF THE RECORD TO BE PRINTED—Filed May 18, 1936

To Charles Elmore Cropley, Esq., Clerk of the Supreme Court of the United States:

In connection with its appeal herein, the appellant above-named intends to rely on the following points:

1. Section 1½ of the California Fair Trade Act as applied against appellant, is arbitrary, and repugnant to the due process clause of Article XIV of Amendments to the Constitution of the United States.

2. The California Fair Trade Act is unreasonably and arbitrarily discriminatory, and repugnant to the equal protection clause of Article XIV of Amendments to the Constitution of the United States.

The parts of the record necessary to a consideration of [fol. 180] the foregoing points are the following:

1. Complaint. (Found at pages 1 to 10, inclusive, of the typewritten record.)
2. Demurrer, omitting paragraphs I, III, IV and V thereof, and also omitting the certificate of counsel thereto. (Found at pages 11 to 15, inclusive, of the typewritten record.)
3. Judgment of the Superior Court of the State of California. (Found at pages 17 to 18, inclusive, of the typewritten record.)
4. Opinion, Order and Judgment of the Supreme Court of the State of California reversing judgment of the Superior Court. (Found at pages 26 to 27, inclusive, of the typewritten record.)
5. Order of the Supreme Court of California denying rehearing and modifying judgment. (Found at page 28 of the typewritten record.)
6. Remittitur of the Supreme Court of the State of California. (Found at page 177 of the typewritten record).

7. Assignment of errors. (Found at pages 83 to 85, inclusive, of the typewritten record.)
8. This statement and proof of service thereof.

Dated May 12, 1936.

Respectfully submitted, Irving M. Walker, Attorney for Appellant. Herman F. Selvin, of Counsel.

[fol. 181] [File endorsement omitted.]

Endorsed on cover: Enter Irving M. Walker. File No. 40,578. California Supreme Court. Term No. 55. The Pep Boys, Manny, Moe & Jack of California, appellants, vs. Pyroil Sales Company, Inc. Filed May 13, 1936. Term No. 55, O. T., 1936.

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Home Ins. Co. v. Dick, 281 U. S. 397, 74 L. Ed. 926, 50 Sup. Ct. Rep. 338	11
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STATUTES AND AUTHORITIES CITED.

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"Fair Trade Act," of California, approved May 8, 1931, as amended May 8, 1933; California Statutes, 1931, c. 278, p. 583 (Deering's General Laws of California, 1931, Vol. 3, Act 8782, p. 4910); California Statutes, 1933, c. 260, p. 793 (Deering's Codes, Laws and Constitutional Amendments of California, 1933 Supp., Act 8782, p. 2396), Section 1 2
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 1024

THE PEP BOYS, MANNY, MOE & JACK OF CALIFORNIA, A CORPORATION,

Appellant,

vs.

PYROIL SALES COMPANY, INC., A CORPORATION,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

JURISDICTIONAL STATEMENT.

(Pursuant to Rule 12.)

I.

Statutory Provision Sustaining Jurisdiction.

The statutory provision sustaining the jurisdiction of this Court is the Act of February 13, 1925, Section 1 [43 Stat. 937; *Judicial Code,* Sec. 237 (a); *U. S. Code,* tit. 28, Sec. 344 (a); *Rev. Stats.,* Sec. 709; *Comp. Stats.,* Sec. 1214 (a).]

II.

State Statute Involved.

1. The State statute involved is an act of the legislature of the State of California, approved May 8, 1931, and amended by an act approved May 8, 1933. The statute is commonly known as the "Fair Trade Act."

2. The official citation of the statute is: *California Statutes,* 1931, c. 278, p. 583; *California Statutes,* 1933, c. 260, p. 793. It may also be found in Deering's General Laws of California, 1931, Vol. 3, Act 8782, p. 4910; *Deering's Codes, Laws and Constitutional Amendments of California,* 1933 Supp., Act. 8782, p. 2396.

3. The statute reads as follows:[1]

> "AN ACT to protect trade mark, owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name.
>
> [Approved by the Governor, May 8, 1931. In effect August 14, 1931.]
>
> THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:
>
> SECTION 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California by reason of any of the following provisions which may be contained in such contract:

---

[1]Section 1½ was added by the 1933 amendment. [California Statutes, 1933, c. 260, p. 793.]

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

SEC. 1½. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

SEC. 2. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

SEC. 3. The following terms, as used in this act, are hereby defined as follows:

'Producer' means grower, baker, maker, manufacturer or publisher.

'Commodity' means any subject of commerce.

SEC. 4. If any provision of this act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but

that such remaining portions remain in full force and effect.

SEC. 5. This act may be known and cited as the 'Fair trade act.' "

III.

Date of Judgment and Application for Appeal.

1. The judgment appealed from was made and entered by the Supreme Court of California on February 28, 1936, and modified on March 26, 1936.

2. A petition for rehearing was denied by the Supreme Court of California on March 26, 1936.

3. The application for allowance of an appeal to this Court was presented to the Chief Justice of the Supreme Court of California on April 8, 1936.

IV.

Statement of the Case.

1. The case arose upon the filing of a complaint, by appellee (plaintiff and appellant below) [2] in the Superior Court of the State of California, in and for the county of Los Angeles, in which plaintiff sought a judgment, pursuant to the provisions of the Fair Trade Act, permanently enjoining appellant (defendant and respondent below) from offering for sale and selling any and all Pyroil products (a trade-marked lubricating substance) except at the prices established and fixed by plaintiff in certain contracts between it and various dealers other than defendant. [*Complaint for Restraining Order and Injunction.*]

2. Defendant resisted the action on the ground that the statute, as thus sought to be applied, was repugnant to

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[2] The parties will be referred to herein by their respective designations in the trial court.

Section 1 of Article XIV of Amendments to the Constitution of the United States, and to certain provisions of the Constitution of the State of California. [See, *Demurrer*, par. II.]

3. The federal question thus presented was raised in the first pleading filed by defendant, *i. e.*, a demurrer to the complaint. The specific portions of the demurrer in this connection are:

> "Defendant above named demurs to the complaint on file herein as follows:
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> • • • • • • •
>
> II.
>
> "That certain act of the legislature of the State of California entitled, 'An Act to protect trademark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name,' commonly known as the 'Fair Trade Act', under and by virtue of the provisions of which said act the within action is sought to be maintained, is void and unconstitutional in that said act is contrary to and in violation of section 1 of Article XIV of the Amendments to the Constitution of the United States. • • •
>
> • • • • • • •
>
> "Wherefore, defendant prays judgment that plaintiff take nothing against it by reason of said complaint, that the same be dismissed. • • •" [Demurrer, par. II.]

3. The Superior Court sustained the foregoing demurrer without leave to amend and entered a judgment dismissing the complaint. [*Judgment of Superior Court of the State of California*, No. 372896.]

4. Plaintiff appealed from this judgment of dismissal to the Supreme Court of the State of California [Notice of Appeal], that being the highest court of the State. [*Constitution of California,* Art. VI, secs. 1, 4.]

5. On February 28, 1936, the State Supreme Court rendered its judgment reversing the judgment of the Superior Court, two justices dissenting. [*Order and judgment of Supreme Court* in L. A. No. 14954.] On March 26, 1936, the State Supreme Court denied a petition for rehearing but modified its judgment by adding thereto a direction to the trial court to enter judgment in favor of the plaintiff as prayed in its complaint. [*Order Denying Petition for Rehearing.*]

6. The only question raised in the State Supreme Court was whether the Fair Trade Act was repugnant to section 1 of Article XIV of Amendments to the Constitution of the United States, and to certain provisions of the Constitution of California. That question was ruled upon as follows: [*Opinion of Supreme Court* in L. A. No. 14954; *Order denying rehearing.*]

> "By stipulation of counsel and order of court, the above-entitled cause was ordered submitted, and to be decided concurrently with *Max Factor & Co. et al* v. *Kunsman,* L. A. No. 14662, decision in which cause has been this day filed.
>
> "The appeal here, as in the Factor case, is by the plaintiff from a judgment of dismissal entered after demurrer to the complaint sustained without leave to amend. Although not as extensive in its allegations as the complaint in the Factor case, the complaint is sufficient to raise the same general question of the constitutionality of the 1933 amendment to the 'Fair Trade Act' * * *
>
> "As the questions on appeal are identical in the two actions, the decision in the Factor case is decisive of

the general question on appeal in this case. * * * Therefore, on the authority of the decision in *Max Factor & Co.* v. *Kunsman,* this day filed, the judgment herein is reversed, and it is ordered that the trial court enter judgment in the within cause in favor of appellant as prayed."[2-a]

In *Max Factor & Co. et al.* v. *Kunsman,* the companion case referred to by the State Supreme Court, the Federal question was ruled upon as follows: [*Opinion of Supreme Court in L. A.* No. 14662.]

"* * * plaintiffs have appealed, presenting the single question: 'Is section 1½ added to the Fair Trade Act of the State of California in 1933 (Stats. 1933, p. 793, *supra*), constitutional?'

"* * * It is respondent's main contention that such a statute violates the due process and equal protection clauses of the Federal and State constitutions, in that it denies him the liberty and freedom of contract.

* * * * * * *

"When the above concepts are applied to section 1½ of the Fair Trade Act, we have no hesitancy in holding that the section is constitutional. The object sought to be attained is clearly within the sphere of State regulation, and the means provided in the statute have a reasonable relation to this object. In our opinion the statute is neither arbitrary nor discriminatory.

* * * * * * *

"The judgment entered on the order sustaining the demurrer without leave to amend is reversed, and respondent having filed an election to stand on its demurrer, it is ordered that the trial court enter judg-

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[2-a] The above quotation, as well as that from the *Factor* case post, are given as modified by the orders denying rehearing.

ment in the within cause in favor of the appellant as prayed for in its complaint."

V.

The Federal Question is Substantial.

The Federal question here involved is substantial for the following reasons:

1. The type of statute here drawn in question is of comparatively recent origin. According to the State Supreme Court "California apparently is the first State to have passed a statute containing the provisions found in Section 1½ of the Fair Trade Act. * * * [*Opinion in Max Factor & Co. et al.* v. *Kunsman.*] Since its adoption in California, nine other states have enacted identical or substantially similar legislation.[3] Bills to enact the same act have been introduced in the legislatures of fifteen states. [See, 49 *Harvard Law Review*, 811, 813, note 15.] The statute is manifestly applicable to virtually every retail dealer in the State. The topic of resale price maintenance

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[3] *Illinois:* Laws 1935, p. 1436; Revised Statutes (Cahill & Moore, 1935) c. 140, secs. 8-11;

Iowa: Session Acts, 1935, c. 106, p. 151; Code (1935) secs. 9884-g1-g7;

Maryland: Annotated Code (Flack, Supp. 1935) art. 83, secs. 105-10;

New Jersey: Laws, 1935, c. 58, p. 140;

New York: Session Laws, 1935, c. 976, p. 1902; Unconsolidated Laws (McKinney, Supp. 1935), pp. 230-1;

Oregon: Law, 1935, c. 295, p. 451; Code (Supp. 1935), secs. 70-401-06;

Pennsylvania: Laws, 1935, No. 115, p. 266; Statutes (Purdon, 1936), tit. 73, secs. 7-11;

Washington: Laws, 1935, c. 177, p. 657; Revised Statutes (Remington, Supp. 1935), secs. 5854-1-6;

Wisconsin: Laws, 1935, c. 52, p. 80.

has been the subject of much investigation, and a considerable body of controversial literature, both economic and legal, has grown up.[4] The question, therefore, is of general and wide-spread importance.

2. The question of the constitutionality of this type of statute has not been passed upon by this Court. An identical act in New York has been held unconstitutional and repugnant to the Fourteenth Amendment by the highest court in that State. [*Doubleday, Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272, 199 N. E. 409.] And two justices of the Supreme Court of California thought the act unconstitutional. [See, *Dissenting Opinions of Mr. Justices Thompson and Shenk.*]

3. Decisions of this Court in respect of fairly analogous statutes create at least a grave doubt as to the constitutionality of the statute here drawn in question. The effect of the Fair Trade Act is (a) to delegate to third persons the power to fix prices in respect of commodities owned and offered for sale by dealers not in contractual privity with the persons exercising this power; (b) to prohibit so-called price-cutting without regard to whether it is done with the intent to destroy or suppress competition; (c) to permit price-fixing in respect of ordinary commodities; and (d) to discriminate, in respect of the application of the State's anti-trust laws, between dealers in commodities bearing the trade-mark, brand or name of the producer, and dealers in similar commodities not so marked or labeled. [*Fair Trade Act*, Secs. 1, 1½; *Cartwright Anti-Trust Act*, California

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[4] See, for example: Federal Trade Commission (1931), *Report on Resale Price Maintenance.* Also, the various references in *Resale Price Maintenance Under State Statute*, 45 Yale Law Journal 672, and, *Fair Trade Legislation*, 49 Harvard Law Review, 811.

Statutes, 1907, p. 984,1909, p. 593, Deering's General Laws of California, 1931, Act 8702.]

This Court has held statutes having the following results to be arbitrary and repugnant to the Fourteenth Amendment: (a) Delegating to third persons the power to control the property of others [*Washington, ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U. S. 116, 73 L. Ed. 210, 49 S. Ct. 50; *Eubank* v. *Richmond,* 226 U. S. 137, 57 L. Ed. 156, 33 S. Ct. 76, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192]; (b) prohibiting price discriminations within a State without regard to the lack of intent to destroy or suppress competition [*Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1, 71 L. Ed. 893, 47 S. Ct. 506]; (c) regulating or fixing prices in respect of ordinary commodities and businesses [*Tyson* v. *Banton,* 273 U. S. 418, 71 L. Ed. 718, 47 S. Ct. 426; *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522, 67 L. Ed. 1103, 43 S. Ct. 630; *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 73 L. Ed. 287, 49 S. Ct. 115; *Ribnik* v. *McBride,* 277 U. S. 350, 72 L. Ed. 913, 48 S. Ct. 545. See, *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 76 L. Ed. 747, 52 S. Ct. 371; *Nebbia* v. *New York,* 291 U. S. 502, 78 L. Ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469]; and (d) exempting certain industries from the inhibitions of a general, anti-trust law [*Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 46 L. Ed. 679, 22 S. Ct. 431].

VI.

Cases Sustaining Jurisdiction.

1. This Court has jurisdiction of an appeal from a judgment of the highest court of a State in a case in which there is drawn in question the validity of a State statute upon the ground of its being repugnant to the Constitution

of the United States and the decision is in favor of its validity.

Chicago R. I. & P. R. Co. v. *Perry,* 259 U. S. 548, 551, 66 L. Ed. 1056, 1059, 42 S. Ct. 524;

New York ex rel. Bryant v. *Zimmerman,* 278 U. S. 63, 66-7, 73 L. Ed. 184, 186-7, 49 S. Ct. 61, and cases there cited.

2. The State Supreme Court having ordered the trial court to enter a judgment for the plaintiff as prayed in its complaint, so that nothing remains to be done in the latter court other than to perform the ministerial act of entering the directed judgment, the judgment here appealed from is final.

Mower v. *Fletcher,* 114 U. S. 127, 128, 29 L. Ed. 117, 5 S. Ct. 799;

Georgia Railway & Power Co. v. *Decatur,* 262 U. S. 432, 436-7, 67 L. Ed. 1065, 1072-3, 43 S. Ct. 613;

Rio Grande Ry. v. *Stringham,* 239 U. S. 44, 47, 60 L. Ed. 136, 36 S. Ct. 5;

Commissioners v. *Lucas,* 93 U. S. 108, 113-4, 23 L. Ed. 822.

3. The Federal question was raised in the first pleading of the defendant, it was insisted upon throughout the proceeding below, and was passed upon by the State Supreme Court adversely to the contention of unconstitutionality. It was, therefore, seasonably and properly raised.

Nor. Car. R. R. Co. v. *Zachary,* 232 U. S. 248, 257, 58 L. Ed. 591, 34 S. Ct. 305;

New York ex rel. Bryant v. *Zimmerman,* 278 U. S. 63, 68-9, 73 L. Ed. 184, 187, 49 S. Ct. 61;

Home Ins. Co. v. *Dick,* 281 U. S. 397, 407, 74 L. Ed. 926, 933, 50 S. Ct. 338.

VII.

Copies of Opinions.

Copies of the opinions of the State Supreme Court, majority and dissenting, in the instant case and in *Max Factor & Co. et al.* v. *Kunsman,* a companion case, are attached to this statement, *post.*

WHEREFORE, it is respectfully submitted that this Court has jurisdiction of the appeal in this cause and that the Federal question presented is substantial.

Dated April 8, 1936.

IRVING M. WALKER,
Attorney for Appellant.

HERMAN F. SELVIN,
Of Counsel.

APPENDIX "A".

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

L. A. No. 14954.

PYROIL SALES COMPANY, INC. (*a Corporation*), *Plaintiff and Appellant,*

v.

THE PEP BOYS, MANNY, MOE & JACK OF CALIFORNIA (*a Corporation*), *Defendants and Respondents.*

Opinion by Supreme Court.

By the COURT:

By stipulation of counsel and order of court, the above-entitled cause was ordered submitted, and to be decided concurrently with Max Factor & Co. et al. v. Kunsman, L. A. No. 14662, decision in which cause has been this day filed.

The appeal here, as in the Factor case, is by the plaintiff from a judgment of dismissal entered after demurrer to the complaint sustained without leave to amend. Although not as extensive in its allegations as the complaint in the Factor case, the complaint is sufficient to raise the same general question of the constitutionality of the 1933 amendment to the "Fair Trade Act" (Stats. 1931, p. 583; Stats. 1933, p. 793). Plaintiff herein seeks an injunction pursuant to the provisions of the act, restraining the defendants from selling Pyroil, a branded and trade-marked article, at retail prices lower than those sought to be maintained by the plaintiff. As in the Factor case, defendants have not bound themselves by any form of contract to resell the commodity at any specified price, but an obligation to so resell is sought by the plaintiff to be imposed on defendants (by the application of section 1½ of the Fair Trade Act—amendment of 1933) by virtue of the fact that other dealers have agreed with plaintiff not to resell at less than certain prices.

As the questions on appeal are identical in the two actions, the decision in the Factor case is decisive of the general question on appeal in this case. Because of that fact, we do not deem it necessary to consider certain specifications urged in the demurrer that the complaint was uncertain, ambiguous and unintelligible. Therefore, on the authority of the decision in *Max Factor & Co. et al.* v. *Kunsman,* this day filed, the judgment herein is reversed.

Mr. Justice Shenk and Mr. Justice Thompson dissent. (See their opinions filed in *Max Factor & Co. et al.* v. *Kunsman,* L. A. No. 14662, filed today.)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

PYROIL SALES COMPANY, INC., *a Corporation, Plaintiff and Appellant,*

vs.

THE PEP BOYS, MANNY, MOE & JACK OF CALIFORNIA, *a Corporation, Defendant and Respondent.*

By the COURT:

The petition for a rehearing herein is denied.

The judgment heretofore entered herein is modified to read as follows: "Therefore, on the authority of the decision in *Max Factor & Co.* v. *Kunsman,* L. A. No. 14662, this day filed, the judgment herein is reversed, and it is ordered that the trial court enter judgment in the within cause in favor of appellant as prayed.

WASTE, *C. J.*

Dated March 26, 1936.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

L. A. No. 14954.

MAX FACTOR & CO. (*a Corporation*), *and* SALES BUILDERS, INC., (*a Corporation*), *Plaintiffs and Appellants,*

vs.

CLARENCE G. KUNSMAN, *Defendant and Respondent.*

OPINION BY SUPREME COURT.

This case presents an attack upon the provisions of the "Fair Trade Act" adopted by the legislature in 1931 (Stats. 1931, p. 583; Deering's Gen. Laws, Act 8782) as amended in 1933 (Stats. 1933, p. 793; Deering's Gen. Laws, Act 8782).

Prior to the adoption of these provisions, the legislature adopted an act commonly known as the " Cartwright Act," in order to promote free competition in commerce, which, among other things, declares it to be unlawful for two or more persons to enter into any combination or contract by which they agree to establish the price of any commodity to the public or consumer, and declares any such combination or contract to be against public policy, and void. (Stats. 1907, p. 984, as amended by Stats. 1909, p. 593; Deering's Gen. Laws, Act 8702.) The Fair Trade Act departs widely from the restrictive provisions of the Cartwright Act, in that it provides (in section 1) that "no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California" by reason of any provision which may be contained in such contract, among others, (1) "that the buyer will not resell such commodity except at the price stipulated by the vendor;" and (2) "that the vendee or producer require in delivery to whom he may resell

such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee." This statute, as originally passed, limits its application to persons who voluntarily enter into such contracts with respect to such resale prices, thus apparently seeking to except such contracts from the application of accepted principles respecting combinations and monopolies restraining trade through price-fixing agreements. The amendment to the Fair Trade Act added in 1933, designated as section 1½, presents the crucial point of this case. It reads as follows: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

These facts appear from the allegations of the complaint: The plaintiff, Max Factor & Co., a Delaware corporation, engaged in the manufacture of cosmetics and toilet articles manufactured by it under certain adopted and registered trade-marks. These trade-marks have long been used in connection with the manufacture, sale and distribution of the cosmetics and toilet articles manufactured and sold by the corporation; that the corporation is the sole owner of the business and good-will in the State of California and all the states in the United States connected with the distribution and sale of the articles associated with such trade-marks; that prior to the commencement of this action, Max Factor & Co. transferred and sold to the plaintiff Sales Builders, Inc., the exclusive right and privilege of distributing and selling in the states of the United States, including the state of California, the cosmetics and toilet articles then and thereafter manufactured by Max Factor & Co., and the good-will pertaining thereto, with the right to use the trade-marks, and the sole right to sell and distribute the cosmetics and toilet articles in all these states. Plaintiff Sales Builders, Inc., has ever since been, and is, the sole owner of the exclusive right to sell and distribute in all of the states, including

California, all of the cosmetics and toilet articles manufactured by the plaintiff Max Factor & Co., and associated with the use of the trade-marks adopted by Max Factor & Co.

The defendant is, and at the times mentioned has been, the owner, proprietor and operator of a retail drug store, situated in the city of Beverly Hills in this state, and was, and now is, engaged in selling at retail to consumers of cosmetics, toilet articles and other merchandise.

For many years there has developed in the drug trade in California the practice of cutting prices, both wholesale and retail, of well-advertised commodities well known to the public, and sold and identified under distinctive trade-marks, brands and names. Such products have been, and are, offered by retail dealers at prices conspicuously lower than the marked or established prices of said commodities as so-called "leaders," for the purpose of creating the impression that other goods of which the prices are not so well known are sold at corresponding reductions, and that all articles dealt in by the particular dealer are sold by him at less than they could be obtained elsewhere. The stores in which these practices are prevalent have become known as "cutrate drug stores." The complaint here sets out at some length matter relative to the fact that the practice of cutting known and established prices has engendered a condition by which other dealers were forced to meet the cut prices advertised by their competitors, one cut producing another in retaliation, so that ultimately, in a particular community, well-known articles identified by trade-marks, brands, and names with an established price are offered at prices cut to a point which yields no profit, and in many cases represents a loss. Other alleged evils of the practice are set forth at length. It is also alleged that to remedy this evil the legislature of California has enacted the Fair Trade Act, *supra*, the constitutionality of which act is here sought to be established.

In order to protect itself against the alleged injuries and uneconomic practices described in the complaint, plaintiff Sales Builders, Inc., adopted a system of doing business, as set out in the complaint, under which contracts

are entered into between the plaintiff and its wholesale jobbing distributors, and between plaintiff and retail druggists and other persons, firms or corporations, selling the Factor products in the state of California, by the terms of which contracts the distributors are obligated to sell these products only to retailers who will resell the same at specified prices, and who, in turn, have entered into a written contract with the plaintiff Sales Builders, Inc., to sell the Factor products at the specified prices. The prices fixed and established by plaintiff Sales Builders, Inc., in said contracts, it is alleged, are fair and reasonable, and no higher than is required to yield to distributors at wholesale and retail a reasonable compensation for their services. It is also alleged that, as known to defendant, practically all of the wholesale druggists in the state of California have executed these wholesale distributors' contracts, and practically all of the retail druggists in the state of California, including the prominent department stores dealing in cosmetics and toilet articles, have executed the retail distributors' contracts, and are observing and conforming with the terms of the contracts. Price-cutting on products of plaintiff Max Factor & Co. has ceased, and plaintiff Sales Builders, Inc., is enjoying, under the terms of the California Fair Trade Act, a reasonable profit from the sale of its goods, and immunity from destructive and uneconomic price-cutting. The distribution of its goods has been unobstructed, and its business has been greatly benefited.

However, the defendant, a retail distributor of plaintiff's goods, is engaged in selling such goods at prices conspicuously lower than other retail dealers in the state of California, in many instances at less than the cost of the commodities to the defendant, with the result that other dealers are forced to meet defendant's price competition by offering plaintiffs' goods for sale at prices competitive with those quoted by defendant. Sales Builders, Inc., upon inauguration of its system of contracts heretofore referred to, tendered to defendant a contract and an opportunity to deal in plaintiffs' goods on the same terms offered to every other retail dealer in the com-

modity in the state of California. The defendant refused and declined to execute the contract or to conform to the system of distribution employed by Sales Builders, Inc., or to observe the sales price fixed in the contract.

The plaintiff Sales Builders, Inc., declined, and has continued to decline, to sell its commodities to the defendant unless and until the defendant enters into the tendered contract with plaintiffs. Defendant has proceeded and is proceeding, to carry out the alleged unlawful and wrongful scheme, and, it is alleged, in so doing has been, and is, acting maliciously and without legal justification therefor. In pursuance and as part of the wrongful and unlawful plan and scheme, defendant, unbeknown to plaintiffs, has procured, and continues to procure, commodities manufactured by Max Factor & Co., bearing the trade-marks, brands and names of Max Factor & Co., and has sold, and is now selling, the commodities at prices less than the retail sales prices which are being sustained by substantially all of the retail dealers in cosmetics and toilet articles in the state of California. Defendant has been, and now is, engaged in informing retail dealers under contract with plaintiff Sales Builders, Inc., as well as the public generally, of defendant's intention to sell plaintiffs' goods at cut-rate prices, which act and the others in the complaint complained of are unduly influencing retail and wholesale distributers of Max Factors & Co.'s products; and the wholesale and retail distributors have complained that they will be compelled to cancel the contracts with plaintiff Sales Builders, Inc., and to sell the Max Factor & Co. products not in conformity with the terms of the contracts entered into by them, but at prices which will meet those announced by the defendant, and at which prices the defendant sells at retail the Max Factor & Co. products. The result of such cancellation, it is claimed, will be the destruction of the business of plaintiffs and the good-will pertaining thereto.

It is further alleged that the defendant threatens to, and will, unless restrained by judgment of court, continue to sell and dispose of the products of the plaintiff Max Factor & Co. at retail prices less than the retail sales prices

regulated by plaintiffs, the continuance of which acts will produce great and irreparable injury to plaintiffs in that it will be extremely difficult, if not impossible, to ascertain the amount of damage that will afford plaintiffs adequate relief for the loss of sales and the destruction of business of plaintiffs and the good-will pertaining thereto. For these reasons, plaintiffs seek equitable relief by way of injunction against the wrongs complained of.

To the complaint containing the foregoing allegations, defendant interposed a general demurrer, which the trial court sustained without leave to amend. Judgment was thereupon entered for the defendant, and the plaintiffs have appealed, presenting the single question: "Is section 1½, added to the Fair Trade Act of the state of California in 1933 (Stats. 1933, p. 793, *supra*), constitutional?"

The title of the Fair Trade Act as passed in 1931 indicates its purpose. It is as follows: "An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name." (Stats. 1931, p. 583.) In its entirety, the act aims at preventing price-cutting of articles sold under a trade or brand name, or under a trade-mark. As amended in 1933 (Stats. 1933, p. 793), section 1½ provides, in order to accomplish the above purpose, that all retailers, whether the goods were originally sold to them under a contract fixing the resale price or not, who have knowledge of such contracts of resale, must sell at not less than the fixed price. It is respondent's main contention that such a statute violates the due process and equal protection clauses of the Federal and State Constitutions, in that it denies to him the liberty and freedom of contract.

We think there are certain fundamental concepts which are decisive of the present case:

1. In the first place, this Court has neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the legislature. We recognize that economic and juridical thought is, and for many years has been, divided on the economic question as to the benefits to the consuming public of free and open

competition, and its necessary corollary, price-cutting. The Sherman and Clayton Anti-Trust Acts passed by Congress and the Cartwright Act passed by our state legislature, and many other similar statutes, are indications that the particular legislatures involved, at the time such statutes were passed, were of the view that, from a social standpoint, free and open competition was desirable. The basis of this view is that, in the long run, it is against public interest to allow the manufacturer, producer, or distributer to fix the resale price of an article. In recent years, there has developed, in opposition to the above views, the concept that a manufacturer of a trade-marked article that is sold in competition with articles of a similar nature and who has fixed a fair price at which he, as well as his distributer and retailer, can make a fair profit, has a property right in the good-will towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to use it in a misleading way to deceive the public. The basic theory on which this concept rests is that from a social standpoint, price-cutting in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products. This latter protection is found in section 2 of the present act, which prohibits manufacturers contracting between themselves to fix the resale price.

As already indicated, the state legislature, by the adoption of the Cartwright Act, *supra*, adopted in 1907, partially, at least, the first economic policy above discussed. By the enactment of the Fair Trade Act in 1931, as amended in 1933, the state legislature, for reasons known to it and which we must presume were sufficient, has seen fit to attempt to change its former policy, and to adopt the second economic concept above discussed. In so far as the statute involves a mere change in the economic policy of the state, this Court has no power or right to interfere. The members of the Court may or may not agree with the economic philosophy of the Fair Trade Act, but

it is no part of the duty of this Court to determine whether the policy embodied in the statute is wise or unwise. It is primarily a legislative and not a judicial function to determine economic policy. The power of the Court is limited to determining whether the subject of the legislation is within the state's power, and if so to determine whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained. These principles have frequently been stated by the United States Supreme Court. In the recent case of *Nebbia* v. *New York*, 291 U. S. 502, at page 537, 54 Sup. Ct. Rep. 505, Mr. Justice Roberts, speaking for the majority of the Court, said:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonable be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect, renders a court functus officio. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this Court need not consider or determine.' (*Northern Securities Co.* v. *United States*, 193 U. S. 197, 337-8.) And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this Court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presump-

tion is in favor of its validity, and that though the Court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

"The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

In *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 160, 33 Sup. Ct. Rep. 66, Mr. Justice Holmes stated:

"If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in

certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses and it may do so none the less than the forbidden act does not differ in kind from those that are allowed."

As was said in *In re Lasswell*, 1 Cal. App. (2d) 183, 188, 36 Pac. (2d) 678:

"It is a salutary doctrine that statutes should be sustained by the courts wherever and whenever this is reasonably possible. It is the purpose, right and duty of the legislative branch of the government to enact such legislation as it deems desirable and its limitations are natural law and the written Constitutions; the courts have no voice in the policy nor in the wisdom of legislative action; they construe the language of the statute and determine its constitutional status."

2. In the second place, it must be kept in mind that the present statute is one passed in the exercise of the *state's* police power, and so differs fundamentally from statutes passed by the Federal Government. The latter is, of course, limited by the powers enumerated in the Constitution, while the states are not subject to such limitation. When the statute is viewed from the standpoint of police power, it is at once apparent that it is not a complete answer to the question of constitutionality to merely point out that the statute restricts a retailer from selling property of a certain class owned by him at prices fixed by himself, and so, of course, restricts his freedom of contract. There is no constitutional right to own property, as such, free from regulation. That a state statute deprives a person of a right which he formerly possessed, whether it be a right to go where he pleases, conduct himself as he pleases, or buy what he pleases, or sell what he pleases at prices fixed by himself, does not per se brand the statute as unconstitutional. The process of civilization has consisted largely of the gradual regulation of the individual in his liberty of action and ownership of property for the public good. As society has become more com-

plex, the necessity for such regulation has become more acute. Neither the State nor the Federal Constitution guarantees any person absolute liberty of action. The liberty guaranteed by our law is a liberty subject to regulation in the public good—an equal liberty, rather than an absolute liberty. In *Jacobson* v. *Massachusetts*, 197 U. S. 11, 26, 25 Sup. Ct. Rep. 358, this principle is expressed as follows: "But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."

In holding a state statute constitutional which provided that all employees should be paid in cash and paid semimonthly, and that such regulation should apply even to existing contracts, the United States Supreme Court, in *Erie R. R. Co.* v. *Williams*, 233 U. S. 685, 699, 34 Sup. Ct. Rep. 761, stated:

"The legislation having been passed in the exercise of the reserved power of the state, is it valid, notwithstanding it prohibits both the plaintiff and its employees from contracting against its provisions? Plaintiff asserts the negative and attempts to sustain the assertion by a very comprehensive argument in which a number of decisions of this Court and of other courts are cited and reviewed. They illustrate by various instances the fundamental and indisputable principle that personal liberty includes the power to make contracts. But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—can-

not be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance.'"

Under its police power, the state, in a proper case has the power, acting in the interests of the general welfare, to regulate property and contract rights, and this includes, of course, the power to regulate the right of free bargaining. The fact that a state can lawfully pass a statute requiring free and open competition, such as the Cartwright Act, *supra*, which regulates the rights of a manufacturer or producer, and limits his freedom of contract, indicates this power exists.

The fact that a statute limits the rights of the owner of property, lowers its value, or limits its use, or limits the right of free bargaining in other ways, does not, of itself, determine the validity of the enactment. There are innumerable illustrations of statutes, passed under the police power, which interfere with the right of free bargaining which have been upheld on the theory the regulation is in the public interest. There are limits to this power, of course, but within those limits the legislature is supreme. These limits cannot be fixed by precedent. As the state progresses, the police power, within reason, develops to meet the changing conditions. (*Miller* v. *Board of Public Works,* 195 Cal. 477, 484, 234 Pac. 381; *People ex rel.* v. *Associated Oil Co.,* 211 Cal. 93, 100, 294 Pac. 717.)

Many illustrations of the power of the state to regulate, in the public interest, the right of free bargaining could be

given. The United States Supreme Court has held that a legislature may (1) fix the charges the owners of grain elevators and warehouses may make (*Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517, 12 Sup. Ct. Rep. 468); (2) fix the charges of insurance companies (*German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 34 Sup. Ct. Rep. 612); (3) fix the time within which the services of employees must be paid for and provide for semi-monthly payments of wages, and prohibit contracts varying the times of payment (*Erie R. R. Co.* v. *Williams*, 233 U. S. 685, 34 Sup. Ct. Rep. 761; (4) fix the fees chargeable by attorneys appearing for employees before workmen's compensation commissioners (*Yeiser* v. *Dysart*, 267 U. S. 540, 45 Sup. Ct. Rep. 399); (5) fix the rate of pay for overtime work (*Bunting* v. *Oregon*, 243 U. S. 426, 37 Sup. Ct. Rep. 435); (6) establish maximum hours of labor for men in certain industries (*Holden* v. *Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383); (7) establish maximum hours of labor for women (*Muller* v. *Oregon*, 208 U. S. 412, 28 Sup. Ct. Rep. 324; *Miller* v. *Wilson*, 236 U. S. 373, 35 Sup. Ct. Rep. 342); (8) prohibit the payment of wages in advance (*Patterson* v. *Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. Rep. 821); (9) require loaves of bread of only a certain size be sold (*Schmidinger* v. *Chicago*, 226 U. S. 578, 33 Sup. Ct. Rep. 182); (10) establish maximum rentals (*Block* v. *Hirsh*, 256 U. S. 135, 41 Sup. Ct. Rep. 458; *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170, 41 Sup. Ct. Rep. 465); (11) fix the maximum rate of interest chargeable on loans (*Griffith* v. *Connecticut*, 218 U. S. 563, 31 Sup. Ct. Rep. 132); (12) regulate the net weight of retail packages (*Armour & Co.* v. *North Dakota*, 240 U. S. 510, 36 Sup. Ct. Rep. 440); (13) declare sales of commodities on margin or for future delivery void (*Booth* v. *Illinois*, 184 U. S. 425, 22 Sup. Ct. Rep. 425); (14) forbid unfair competition by charging of lower prices in one locality than those exacted in another (*Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 33 Sup. Ct. Rep. 66); (15) fix the retail price of milk (*Nebbia* v. *New York*, 291 U. S. 502, 54 Sup. Ct. Rep. 505).

In each of the above cases the police power of the state was held broad enough to warrant an interference with free

bargaining. As was said by Chief Justice Hughes in *Miller* v. *Wilson, supra,* at page 380, "As the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest—the question is whether the restrictions of the statute have reasonable relation to a proper purpose."

The police power is no longer limited to measures designed to protect life, safety, health, and morals of the citizens, but extends to measures designed to promote the public convenience and the general prosperity (*People ex rel.* v. *Associated Oil Co.*, supra; *Chicago, B. & Q. Ry.* v. *Illinois*, 200 U. S. 561, 26 Sup. Ct. Rep. 341), and includes economic measures regulating competition. (*Northern Securities Co.* v. *United States*, 193 U. S. 197, 24 Sup. Ct. Rep. 436; *Nebbia* v. *New York*, supra.)

The above cases conclusively establish that there is no absolute right of free bargaining guaranteed by the Constitution. Since, under the proper circumstances, the right of free bargaining can be, and in the past has been, regulated, it necessarily follows that, in a proper case, this power to regulate free bargaining includes the power to regulate the price. Every one of the cases above cited, and many more that could be cited, illustrate the breadth of the power invested in the state legislature to affect the terms of a business bargain between individuals, and in every case the regulation affected the price. As was said in the *Nebbia* case, supra (p. 532): "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however, able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. (*Munn* v. *Illinois*, 94 U. S. 113.)"

Respondent seriously urges that the legislature can only regulate prices as to those articles "affected with a public

interest". There are several answers to this contention. As already pointed out, this statute does not aim primarily at regulating prices, but at protecting the property and contract rights of the manufacturer, producer, distributer and retailer. Moreover, the statute does not attempt to regulate the price of any one article. It may be that when the legislature attempts to regulate the price of a particular commodity, in order to justify classifying that article differently from other commodities, its purchase and sale must affect the public interest. But here the legislation affects an entire class of articles, which class, as will later appear, is reasonably the subject of classification. Another complete answer to this contention is that if the purchase and sale of any one article or entire class of articles is subject to regulation under the police power, for reasons already stated, then its purchase and sale does affect the public interest. This was the exact holding in the Nebbia case, supra, where, at pages 533 and 536, it is stated:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. Thus understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression. * * *

"The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this Court wherein the expressions 'affected with a public interest', and 'clothed with a public use', have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon a proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

The next major factor that must be emphasized is that the statute here involved is not solely a price fixing or regulating statute. It is true that the statute permits the producer to fix by contracts with his distributer, and the latter by contracts with retailers, the minimum resale price of the product, and that by section 1½ of the act the minimum price so fixed is made binding on all retailers who have knowledge of the contracts, and in this sense it is a price regulating statute. However, to regulate prices as such was not the main purpose of the statute. The statute only applies to certain articles sold under the trade-name or brand or trade-mark of the producer. As to such articles, the producer or manufacturer, through advertising or other means, has built up a good-will in connection with the articles, which good-will is a species of property entitled to protection. When the retailer sells such an article to a customer, the article is not sold solely on the reputation of the retailer, but partially, at least, on the reputation built up by the owner of the trade-mark, brand or trade-name. Moreover, section 1½ comes into operation only when the manufacturer or producer has entered into contracts fixing the resale price. The statute, as its title indicates, by preventing price-cutting, is aimed at protecting these valuable property and contract rights of the manufacturer or producer—rights just as valuable and just as much entitled to protection as the right of the retailer, who is attempting, by exercising his claimed right of freedom of action, to injure the property and contract rights of the manufacturer or producer. The statute, in other words, does not merely prohibit price-cutting in order to regulate prices, but prohibits price-cutting in an attempt to protect the validly acquired rights of others. The common law, without statutory authorization, long recognized that unjustifiable interference with contract rights of others constituted a tort. (*Lumley* v. *Gye*, 2 El. & Bl. 216.) The statute here involved, in a large measure, merely extends that common law doctrine to the transactions enumerated in the statute.

(4) Another important factor that must be kept in mind is that in so far as the Fair Trade Act permits the producer to fix the resale price of his product by contract, the

act merely embodies a rule of law well settled in this state. In *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745, and in *D. Chirardelli Co.* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041, it was held that as far as articles in intrastate commerce are concerned, without statutory authorization the manufacturer, by contract with a retailer, may fix the resale price. The Fair Trade Act as passed in 1931 merely codifies the rule of those cases, which was partially changed by the Cartwright Act, supra.

When the above concepts are applied to section 1½ of the Fair Trade Act, we have no hesitancy in holding that the section is constitutional. The object sought to be attained is clearly within the sphere of state regulation, and the means provided in the statute have a reasonable relation to this object. In our opinion the statute is neither arbitrary nor discriminatory.

California apparently is the first state to have passed a statute containing the provisions found in section 1½ of the Fair Trade Act. New Jersey, in 1916, however, passed a statute that permitted the manufacturer to fix the resale price of a trade-marked article, or article sold under a trade or brand name, by attaching a notice fixing the resale price to the container in which the article was sold. The resale price so fixed was made binding on all retailers. In *Ingersoll & Bro.* v. *Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030, 89 N. J. Eq. 332, 108 Atl. 128, the New Jersey court, in two opinions, held the statute constitutional on substantially the same reasoning set forth in this opinion.

Since the oral argument and submission of the cause, respondent has cited a decision of the New York court of appeals, in which that court held the New York Fair Trade Act unconstitutional. (*Doubleday, Doran & Co., Inc.*, v. *R. W. Macy & Co., Inc.*, decided January 7, 1936, — N. Y. —, 199 N. E. 409). Because the New York act was copied almost verbatim from the California statute, respondent cites the opinion of the New York court as "strongly persuasive." We are not prepared to share counsel's optimistic view of the weight to be given the decision. While, on first impression, it seems entitled to the importance attached to it by respondent, we are of the view that, upon

careful analysis, it loses its persuasive force. A brief discussion of the decision will, we believe, be helpful in throwing in relief some of the highlights of the situation now before this Court. For several reasons, the decision of the New York court impresses us as not being in point in the discussion here. It is expressly limited to a declaration that section 2 of the New York act (identical with section 1½ of the California act) is unconstitutional "as applied to the facts set forth", which are different from those of the case now before this court. The plaintiffs in the New York case were Doubleday, Doran & Company, Inc., publishers, and Doubleday, Doran Book Shops, Inc., retailers. The contract mentioned in the decision is one between the publishing corporation and the retailing corporation. Aside from any inference to be drawn from the similarity of names, the opinion states that the two plaintiffs, in reality, were one and the same, for it refers to "the price which they [the plaintiffs] stipulated as a retail price in a *contract between themselves.*" Other language indicates the book shop corporation is merely a subsidiary and agent of the publishing company. Again, the plaintiff publishers sold the books in question to the defendant without exacting or, in so far as appears, attempting to exact, from the buyer any restriction on the price for resale. In other words, the producer of goods placed a retail price upon its product by its own independent action, and voluntarily sold the goods to a retailer (Macy & Co.) for resale without seeking, or at least obtaining, any agreement by the retailer to observe any retail price. In the action, it seeks to prevent the retailer, to whom it has sold the goods without restrictions, from selling the goods at prices less than those which the producer saw fit to fix, in a contract between it and a subsidiary. The New York court accepts, for the purpose of the decision, the interpretation of the act as covering such situation, and, upon that assumption, and apparently that assumption alone, holds section 2 of the act to be unconstitutional. The plaintiffs in the New York case allege only a single contract purporting to fix the resale prices, and that in a pretended contract made with itself, far different from the factual setup in the *Max Factor & Co.* case. Here

there has been adopted a system of making written contracts, generally between producers and retail distributors, under which the products may and will be sold only to retailers who will resell at specified prices and have entered into contracts with the distributor to so sell such products. Practically all of the wholesale and retail druggists in California have executed such contracts, and are observing them, and the plaintiffs' distributers have refused, and will refuse, to sell such products to wholesalers or retailers who do not enter into such contracts. A contract has been tendered to defendant for execution, but defendant will not enter into the agreement. The plaintiffs therefore decline to sell the commodities to defendant unless the defendant enters into the contract. The defendant, with full knowledge of the system of contracts, and the extent of the execution and compliance with their terms by the trade, has obtained Factor products "unbeknown" to plaintiffs and is selling them at prices less than the prices fixed by the contracts so extensively entered into by others. These facts serve to vitally differentiate the situation in New York from that here. In place of a single pretended contract made by the producer with itself, we have here a uniform system of contracts applied generally to wholesale and retail distributers in the state. In place of a voluntary sale without restriction by the producer to a retailer, there is here a consistent refusal by the producer or owner to sell to the defendant or to any other buyer who will not agree to maintain resale prices. A retailer who has been given an opportunity to enter into the contract has refused to do so, and having obtained goods, not from the producer or owner, but indirectly and without the consent or knowledge of the producer, is engaged in cutting prices of the products. The New York decision does not discuss the fundamental basis and purpose of the legislation represented in the California Fair Trade Act, and does not disclose the ground upon which the section of the New York act, as interpreted for the purpose of the decision, is unconstitutional. We cannot find, in this casual treatment of a constitutional question, sufficient justification for regarding the decision as applicable to the facts here.

Respondent also urges that the statute denies equal protection of the laws in that it applies only to articles sold under a trade-mark or trade or brand name, and does not apply to non-trade-marked commodities, and, among trade-marked articles, applies only to those in free and open competition with others of a similar nature. As already pointed out, it is only in reference to those commodities included within the statute that the manufacturer or producer has a property right in the nature of good-will, which, in the public interest, should be protected. Such a classification is reasonable. The exclusion of trade-marked articles not in free and open competition with others of a similar nature is likewise reasonable. By that provision the public is protected from artificially high prices imposed by one with an exclusive market. (See *Borden's Farm Products Co.* v. *Ten Eyck, Commissioner,* decided by the United States Supreme Court, February 10, 1936.)

The contention made by the respondent that the Fair Trade Act attempts to regulate interstate commerce, and so is unconstitutional, is without merit. The allegations of the complaint clearly establish that as to the transaction now before the court it is one arising and involving goods wholly located within this state. Although the terms of the statute are broad, and could conceivably be interpreted to include interstate transactions, we must necessarily construe the act as applying only to transactions within the state, that being the sole territorial extent of the legislature's powers. (*California Adjustment Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 179 Cal. 140, 175 Pac. 682; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 29 Sup. Ct. Rep. 511.)

Respondent presents several hypothetical situations under which enforcement of the act would be inequitable or difficult, or, perhaps, even unconstitutional. It is elementary, of course, that a statute may be invalid as applied to one set of facts, yet valid as applied to another (*Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 42 Sup. Ct. Rep. 106.) The situations conjured up by respondent are not here involved, and respondent is limited in his attack to the application of the statute to the factual situa-

tion now before the Court. Moreover, the principal remedy granted by the statute is injunctive relief. The equity court has broad and flexible discretionary powers, and can, and undoubtedly would, deny injunctive relief where such relief would be inequitable.

It is beyond denial that, under our form of government, the use of property and the making of contracts are normally matters of private concern. Here, no question of impairment of existing contracts is involved. No criminal proceedings have arisen under the circumstances of the case. The plaintiffs are seeking, in a civil action, to restrain conduct on the part of the defendant which the legislature, in determining a question of economic policy, has declared to be "unfair competition, and actionable at the suit of any person damaged thereby." We are of the view that its action measured by the yardstick of the cases cited, and other authorities of similar import, must be held to be free from constitutional objections, and, not being shown to be unreasonable or arbitrary, it must be sustained as a proper legislative declaration of the policy of the state on the practice of price-cutting. The demurrer of defendant to the complaint should have been overruled.

For the foregoing reasons, the judgment entered on the order sustaining the demurrer without leave to amend is reversed.

WASTE, *C. J.*

We concur:

CURTIS, *J.*

LANGDON, *J.*

SEAWELL, *J.*

DISSENTING OPINION.

I dissent. I cannot bring myself to agree with the majority opinion in this case. The question herein is not whether the Court or the legislature is authorized to determine the wisdom of an economic policy. It is, of course, elementary that it is beyond the function of the Court to attempt to define or limit the economic policy or to determine the wisdom of a chosen course by the state. And it is also fundamental that simply because such determination

does not fall within the judicial function it does not follow that it belongs in the legislative field. It may be reserved by the State Constitution to the people, or the state may be prevented from acting by the inhibition of the Federal Constitution. The question, then, in this case may be phrased as follows: Has the legislature exceeded its powers as limited by some inhibition of the Constitution in which the people have defined for themselves an economic policy and in which they have set up a safeguard against the infringement by the legislature of some natural right with which they are endowed? If the act in question exceeds the legislative power thus measured, it is likewise beyond the judicial function to sap the inhibition or safeguard of its essential vitality, by construction, in order to accomplish or permit a course of action the Court may deem to constitute a wise economic policy. (See opinion of Mr. Justice Burnett in Ex parte Newman, 9 Cal. 502, 510, for a comprehensive statement of this principle.) The respondent insists that the section brought under our scrutiny in this cause does do violence to sections 1 and 13 of article I and section 25 of article IV of our State Constitution, as well as the Fourteenth Amendment to the Federal Constitution. It seems to me the argument in this regard is unanswerable. Section 1 of article I reads as follows: "All men are by nature free and independent, and have certain inalienable rights among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness." Section 13 of the same article provides that no person shall "be deprived of life, liberty or property without due process of law," which is, of course, in keeping with a portion of the Fourteenth Amendment to the Federal Constitution. Section 25 of article IV forbids the enactment of special laws respecting enumerated subjects or where a general law can be made applicable.

Sections 1 and 13 of the first article have been considered by this Court in previous cases, and I believe if the amendment under attack is to be sustained, they must be directly overruled or the Court forced to the extent of saying all

trade-marked goods, including the specific item of cosmetics here involved, have been so devoted to a public use that they have become "affected with a public interest." I can scarcely believe that anyone would adopt the latter alternative. Hence I advert to the construing authorities. It was held in the early case of *Ex parte Newman*, to which I have already referred, that the declaration of principles contained in article I, and which were intended for the protection of every individual, "can be enforced by judicial determination." In *Ex parte Quarg*, 149 Cal. 79, this Court proceeded to enforce the section upon which the respondent relies for his protection. With respect to an enactment which attempted to prohibit the sale of theater tickets at a price in excess of that originally charged, it is there said: "The constitutional guaranty securing to every person the right of 'acquiring, possessing and protecting property' refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and, in connection with the right of personal liberty, *it includes the right to dispose of such property* in such innocent manner as he please, and *to sell it for* such price as he can obtain in fair barter" (italics added). To the same practical effect is *Ex parte Dickey*, 144 Cal. 234, in which we find this expression: "This right of contract common to the followers of all legitimate vocations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed protection by the Constitution. By the act in question he is arbitrarily stripped of this right of contract, and deprived of his property, and left, in following his vocation and in pursuit of his livelihood, circumscribed and hampered by a law not applicable to his fellow men in other occupations." (See, also, *In re Smith*, 193 Cal. 337.) Again in *People* v. *Pace*, 73 Cal. App. 548, after approving the language which we have quoted from *Ex parte Quarg*, it was held that the legislature could not require a person to secure a permit as a condition precedent to the sale of his own stock, although in repeated and successive transactions. The Court said: "In these days

when the urge is strong upon legislative bodies to extend the paternal arm of government into the realm of economic activities, it is particularly important that courts in the exercise of the particular functions imposed upon them by the Constitution, should scrutinize with care legislation which tends to encroach upon the constitutional guaranties, to the end that the right of the individual to liberty and possession of property shall become, not a mere theory, but shall be maintained as a practical reality. And while it is true that the increasing conflict between the rights of the individual and the general welfare of society presents ofttimes difficult and perplexing problems, nevertheless courts should not and will not permit the violation of those most fundamental rights that underlie our very existence as a nation. (*Dobbins* v. *Los Angeles*, 195 U. S. 223, 49 L. Ed. 169, 25 Sup. Ct. Rep. 18, see, also, Rose's U. S. Notes; *Pacific Palisades Ass'n* v. *City of Huntington Beach, et al.*, 196 Cal. 211, 40 A. L. R. 782, 237 Pac. 536.)

There are a host of authorities from other jurisdictions which might be cited to the same effect, but for my purposes it will be sufficient to refer to but two. First we find comparable language in the case of *Tyson Bros.-United Ticket Office* v. *Banton*, 273 U. S. 418, as follows: "In the endeavor to reach a correct conclusion in respect of this inquiry it will be helpful by way of preface to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, case of the *State Freight Tax*, 15 Wall. 232, 278; and as such, within the protection of the due process of law clauses of the fifth and fourteenth amendments. See *City of Carrollton* v. *Bazzette*, 159 Ill. 284, 294, 31 L. R. A. 522, 42 N. E. 837." Second I refer to *Doubleday, Doran & Company, Inc.* v. *R. H. Macy & Co., Inc.*, 199 N. E. 409, which case involved a practically verbatim copy of the section here involved, adopted by the legislature of New York. Bearing in mind that the New York Court of Appeals was the same court which first sustained the New York Milk Control Act (*People* v. *Nebbia*, 262 N. Y. 259), which was the subject of judicial inquiry in the case of

Nebbia v. *New York*, from which the majority opinion has quoted so extensively, the expressions we find in the case are especially illuminating. It is there said: "That the states cannot fix the selling price of any and all commodities has been settled. (*Williams* v. *Standard Oil Co.*, 278 U. S. 235, 49 S. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596; *Tyson & Bro.* v. *Banton*, 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 718, 58 A. L. R. 1236; *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 128; *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, 37 S. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E., 1196, Ann. Cas. 1918A. 955.)

"Books, at least these books, are not 'affected with the public interest' any more than theater tickets. No emergency has yet arisen in literary publications and the business is not such as comes within the class which must submit to rate fixing. Circumstances which cannot be foreseen from one generation to another may arise which will require certain articles to submit to regulatory prices in order that the public may get them at all or get them in a pure and beneficial state. We cannot always express legislative power in exact formulas nor decide a case before it happens. Experience is the mother of teachers. Under the *Nebbia case*, for instance (*Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469) no one would doubt now that New York state would have the power to get milk to the public somehow if any combination of forces threatened to shut off all supply or to deteriorate that which was supplied. The price might be an element to be considered with other things in such a case. So we thought in *People* v. *Nebbia*, 262 N. Y. 259, 186 N. E. 694, but to fix arbitrarily the price of books by legislation and not by agreement comes within the condemnation of the decisions which have heretofore dealt with like legislation. What the legislature cannot do directly, it cannot do indirectly, nor does it cease to be a price fixed by the legislature because that body has clothed the publisher with the power of authority to establish it." I think it so fundamental and so well established that the right to sell at any price obtainable by the owner is a part

of the property itself and within the protection of the constitutional guaranties that I shall not devote more space to that thought.

However, it must be considered that there is a factor which takes some kinds of business outside of the strict protection of the inhibition, and to an ascertainment or rather statement (because it has heretofore been well explained and adhered to) of that element I now turn. What is it? For the purposes of a ready statement we say that where a business is "affected with a public interest" it is subject to regulatory measures. Just what is meant by the expression is well stated in *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522, 535, as follows: "Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. (*State* v. *Edwards,* 86 Mo. 102, *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S. 252, 254.)

"(3) Businesses which though not public at their inception may be fairly said to have arisen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the langauge of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to

belong to its private owner and to be entitled to protection accordingly."

Again it is said therein (p. 536): "In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn* v. *Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public."

Making the meaning of the unanimous court still more clear, the author of the opinion says (p. 537): "An ordinary producer, manufacturer, or shopkeeper may sell or not sell, as he likes, *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 320; *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S. 252, 256, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, it usually distinguishes private from quasi-public corporations.

"In nearly all the business included under the third head above, the thing which gave the public interest *was the indispensable nature of the service and the exorbitant charges and the arbitrary control to which the public might be subjected without regulation.*" (Italics added.)

To revert to the case of *Tyson & Bro.* v. *Banton, supra,* for a moment we find apt language describing the expression as follows (p. 430): "The authority to regulate the conduct of a business or to require license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or busi-

ness, *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 246, but exists only where the business or the property involved has become 'affected with a public interest.' * * *

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood."

It can hardly be denied that the public is interested in the maintenance and continuity of the oil business, particularly as the same relates to the sale of gasoline and lubricating oils. And yet the Supreme Court of the United States denied the power of the legislature to regulate the price in the case of *Williams* v. *Standard Oil*, 278 U. S. 235, 239, saying in part as follows: "It is settled by recent decisions of this Court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.' * * * By repeated decisions of this Court, beginning with *Munn* v. *Illinois*, 94 U. S. 113, that phrase, however, it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property or services must be measured. As supplied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. * * * Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public

are warranted in having a feeling of concern in respect of its maintenance. * * *

"In support of the act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the State of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the state. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest'." I might add other authorities in which the legislative power has been denied, but there has never been a departure from the announced principle. Even in the case of *Nebbia* v. *New York, supra,* to which reference has been made, the Court justifies its conclusion by the fact that milk was indispensable and that it was easily contaminable; that in order to secure pure and wholesome milk for the public during the emergency which the legislature declared to exist it was necessary for the state to take control. The facts of the case when studied reveal that the comfort claimed to be found by appellant in the opinion does not in truth exist. And here I desire to point out a fallacy involved in the majority opinion. The language quoted is taken from cases involving businesses "affected with a public interest" as hereinbefore defined, or from authorities dealing with the health or public safety. The result is that the language, lifted from its context and placed in a different setting, takes on a meaning altogether foreign to that which it originally possessed.

Nor can it be seriously contended that the amendment is not a price-fixing statute. It fixes the price indirectly and it has this additional vice, that it leaves the fixed price to the dictates of the producer—in other words, the legis-

lature has, as said in the *Doubleday-Doran* case, attempted to delegate authority to the producer of a trade-marked article to set the retail price. No one can object to the contract which he may enter into, but to make this contract binding by legislative fiat as to retail price upon persons who are not privy thereto violates every principle guaranteed the individual by the constitutional guaranties. The element of knowledge on the part of the seller is a minor factor, provided very simply by notice on the goods or label. It is manifest that the act here in question was not based upon the public interest, or that the consumer was considered. Its effect is to grant to the producer a privilege and preference unwarranted by the basic law. Not only that—but seeking to justify its enactment upon the theory that it is designed to prevent price cutting which injures a competitor, it reaches all merchants who, though they may be satisfied with a smaller profit than others engaged in the business, or who by reason of a greater efficiency are able to sell at lower prices and yet make the same profit, are still compelled to exact from the consumer a fixed retail price. It strikes at every merchant alike, regardless of intention, who desires to manage and control his own business. It is thus made perfectly clear that the object of the act is not to prevent unfair competition but to fix prices. Such being its purpose and operation, it falls under the condemnation of cases involving similar efforts, such as *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, and the other cases already cited.

But the amendment has other fatal defects. A study of the authorities which deal with the regulation of businesses, both those which sustain and those which reject the claim of legislative power, reveals that the question of whether all the surrounding circumstances have operated to change the status of a private business free from legislative regulation into one in which the public has an interest is one for judicial inquiry and determination (*Wolff Packing Co.* v. *Court of Industrial Relations, supra.*) But the act here in question attempts to lump all businesses into a common regulatory basket, provided only that the product is trade-marked and is originally in competition.

I have already mentioned the fact that the legislature has attempted to delegate the price-fixing power to the producer or manufacturer. Before concluding, I wish to direct attention to the almost obvious and inescapable fact that there is no authority in the law for such action. A person may not be bound with respect to his property by the action, whim or caprice of another, particularly where the latter is not vested with any official responsibility or duty. The delegation of such power is contrary to the fourteenth amendment to the Federal Constitution. (*Washington* v. *Roberge*, 278 U. S. 116; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 55 Sup. Ct. Rep. 241.) Of course, I concede the producer's right to sell or not to sell at his own price, but when his property has been sold and passed into hands not hampered by contractual covenants the producer's control and right therein has altogether ceased. It takes no great amount of imagination to visualize the discriminary practices and abuses which might be indulged were the power of the producer to establish a fixed retail price upheld.

Since the preparation of the foregoing opinion I have read the dissenting opinion by Mr. Justice Shenk and desire to express my concurrence therein.

The judgment should be affirmed.

THOMPSON, *J.*

DISSENTING OPINION.

In concurring in the dissent of Mr. Justice Thompson I desire to comment on certain matters not touched upon in his opinion. In the first place let me point out that the particular statute under attack should not be confused with the Unfair Practices Act of 1935 (Stats. 1935, p. 1546), which denounces unfair competition and so-called piratical trade transactions, and was designed to afford full relief against such abuses on behalf of anyone aggrieved. That act is said to have been passed at the behest of the business interests of the state, including the manufacturer, middleman and retailer. While the validity of that statute has not been passed upon by this Court it is enough to say for present purposes that it appears to be a painstaking endeavor by the legislature to combat the abuses which the

business interests have deemed unfair practices in the competitive field. It appears to have been designed to permit fair competition to function under its own economic laws.

The act now under attack as originally passed in 1931 was confined to the field of contract in the fixing of prices by agreement as between manufacturer, jobber and retailer, and when so limited no valid objection to it has been pointed out. It is the amendment of 1933 which makes the prices so fixed binding on all who are not parties to the contract. In other words, it places within the power of the manufacturer or producer to fix the retail price of all commodities regardless of their reasonableness. It does not purport to denounce unfair competition alone, but affects fair competition as well. Carried to its length it would enable the manufacturer or producer to destroy all competition and thus place the consumer at their uncontrolled mercy even as to food, clothing and all commodities which are the subject of manufacture or production. This, too, without regard to serious marketing problems which have confronted some of the basic industries of the state. It is said that whether these results should follow is an economic problem with which the courts have nothing to do. But it is the business of the courts to see to it that, in carrying out any such program, the fundamental and guaranteed rights of the citizen to deal with his property as he chooses, subject to such reasonable regulations as may properly be imposed, are not destroyed. The statute under attack does not regulate. It prohibits. It is essentially a price-fixing statute. To me it is beyond question that the legislature itself could not fix the retail prices of all or any commodities not affected with a public interest or clothed with a public use. We are bound by the decisions of the Supreme Court of the United States on that subject, as pointed out in the opinion of Mr. Justice Thompson. If the legislature itself is without power to fix the retail price of such commodities, how then can it delegate that power to one who is governed by no power except his own self interest?

It is said in the majority opinion that the statute under attack is confined to retail prices of trade-marked or branded commodities; that this is a valid classification and

that the legislature has the right to single out commodities so marked as a proper subject of preferment. This is not so, for the reason that there is no limitation on the acquisition of trade-marks and brands, except the ingenuity or lack of it, but aided by prize contests, on the part of the manufacturer or producer in conjuring up names to suit his purposes. He then may acquire an exclusive right to the *name* under sections 3196-3202 of the Political Code. Under this easy plan all commodities, essential or otherwise, may be trade-marked or branded. It does not follow that because the right to the use of the name is exclusive, the right to shackle the commodity with a retail price is vested in the owner of the name, regardless of where the commodity may find itself in the channels of trade, divorced from any contractual relation with the owner of the name.

As to the price-fixing feature of the statute the highest court in the land has spoken in terms which I feel bound to respect. Also, the state of New York enacted the same statute now under attack. The highest court of that state recently and correctly held it void under the Federal Constitution. In deference to what I deem to be the established law I arrive at the same conclusion.

SHENK, *J.*

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK.

L. A. 14662.

MAX FACTOR & CO. (*a Corporation*), *and* SALES BUILDERS, INC. (*a Corporation*), *Plaintiffs and Appellants,*

vs.

CLARENCE G. KUNSMAN, *Defendant and Respondent.*

By the COURT:

The petition for a rehearing is denied.

The judgment heretofore rendered is modified as follows: Strike out the last two lines in the opinion, and insert in

lieu thereof, the following: "The judgment entered on the order sustaining the demurrer without leave to amend is reversed and respondent having filed an election to stand on its demurrer, it is ordered that the trial court enter judgment in the within cause in favor of the appellant as prayed for in its complaint."

Dated March 26, 1936.

WASTE, *C. J.*

(7794-Q)

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936.

No. 55.

The Pep Boys, Manny, Moe & Jack of California, a corporation,

Appellant,

vs.

Pyroil Sales Company, Inc., a corporation,

Appellee.

APPELLANT'S BRIEF.

Opinions Below.

The opinions of the Supreme Court of the State of California have not yet been officially reported. They may be found, however, in 91 California Decisions 367, 520, 55 P. (2d) 194. The opinions in *Max Factor & Co. v. Kunsman*, a companion case decided the same day, may be found in 91 California Decisions, 345, 521, 55 P. (2d) 177.

The opinions in both cases are printed at pages 13 to 48 of the statement as to jurisdiction, heretofore filed. The opinion in the instant case is also printed at pages 9 to 10 of the transcript of the record.

Statement of the Case.

This is an appeal from a judgment of the Supreme Court of the State of California reversing a judgment of the Superior Court of that state dismissing the complaint of appellee.[1] The case arose under an act of the legislature of California commonly known as the "Fair Trade Act."[2] That act provides, in substance, that no contract relating to the sale or resale of any commodity bearing, or the label or content of which bears, the trademark, brand or name of the producer, shall be deemed in violation of any law of the state of California by reason of any provision fixing the price at which the vendee may resell that commodity; and that knowingly advertising, offering for sale or selling any such commodity at less than the price fixed in any such contract, whether the offeror or seller be a party to such contract or not, is unfair competition and actionable at the suit of any person damaged thereby. [*California Statutes,* 1931, c. 278, p. 583, sec. 1; *California Statutes,* 1933, c. 260, p. 793, sec. 1½; *post,* pp. 7-8.]

Pursuant to the provisions of this statute, appellee commenced an action in the Superior Court in which it sought to enjoin appellant, who had not entered into any price-fixing arrangement with appellee, from offering for sale or selling a certain trademarked commodity called "Pyroil" at prices less than those fixed in various contracts between appellee and dealers other than appellant.

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1. The parties will be referred to here by their designations in this court.

2. The act is printed in full, *post,* pp. 7-8.

[R. 1-7.] A demurrer to appellee's complaint was sustained by the Superior Court without leave to amend and a judgment of dismissal entered. [R. 7, 8.] On appeal to the state Supreme Court this judgment was reversed with directions to enter a judgment for appellee as prayed. [R. 9-10, 12.]

The only question considered by the state Supreme Court was the constitutionality of the Fair Trade Act. [R. 9-10.] The material allegations of appellee's complaint upon which the decision of that question was made to depend are as follows:[3]

There has developed in the automobile accessory trade in California a practice of cutting the price of well-established trademarked commodities and using these commodities as "leaders" or "loss leaders" to attract prospective purchasers, the dealer depending upon those so attracted to purchase other articles yielding a sufficiently large profit to make up for the losses involved in such cut prices. [R. 2-3.] To remedy this evil, the legislature adopted the Fair Trade Act. [R. 3.]

Pyroil is a lubricating substance bearing distinctive trademarks, names and labels, manufactured and patented by the Pyroil Company (not appellee) of La Crosse, Wisconsin. Through advertising in national publications and otherwise Pyroil has become a well-established commodity enjoying a good reputation. [R. 2.] Appellee, by virtue of contracts with its manufacturer, has the sole right to

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3. The order of statement adopted here is not that followed in the complaint, but no material allegation is omitted.

sell and distribute this commodity in Southern California. [R. 1.]

Appellee has adopted a system of doing business which consists of entering into contracts with dealers in Southern California obligating the latter to sell Pyroil only at certain specified prices. These prices are fair and reasonable, and practically all dealers in Southern California have executed such contracts with appellee. [R. 3-4.] Appellant has always had the opportunity to purchase Pyroil on the same terms and conditions as other dealers but has not done so. Instead it has obtained the product elsewhere from sources unknown to appellee. [R. 4.]

As a result of these contracts and of appellee's system of merchandising appellee enjoys a reasonable profit in the sale of its products, immunity from injurious and uneconomic price-cutting, and unobstructed distribution of its products; the public has benefited through reasonable prices and high quality; and dealers obtain a reasonable compensation for their services. [R. 3.]

Appellant, operating six retail stores in Southern California, for the purpose of disrupting and interfering with appellee's contracts and business, has wilfully and knowingly advertised, offered for sale, and sold Pyroil at less than the prices stipulated in said contracts. [R. 4, 5.] As the result of these acts of appellant other dealers have been induced and forced to cancel and threaten to cancel their price-fixing contracts with appellee and to refuse to accept further deliveries of Pyroil; the public is induced to believe that Pyroil is not worth the price at which it is nationally advertised; and other dealers cannot market the product at the fixed or advertised prices and threaten to discontinue its sale. [R. 5.]

The acts complained of have caused and will cause irreparable injury to appellee for which it has no adequate remedy at law. [R. 6.] The nature of this injury, except as it may be inferred from the other facts pleaded, is not stated.

State Statute Involved.

The Fair Trade Act, as amended in 1933, reads as follows [*California Statutes,* 1931, c. 278, p. 583; *California Statutes,* 1933, c. 260, p. 793; *Deering's General Laws of California,* 1931, Vol. 3, Act 8782, p. 4910; *Deering's Codes, Laws and Constitutional Amendments of California,* 1933 Supp., Act 8782, p. 2396]:

> "AN ACT to protect trade mark, owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name.
>
> THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:
>
> Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California by reason of any of the following provisions which may be contained in such contract:
>
> 1. That the buyer will not resell such commodity except at the price stipulated by the vendor,
>
> 2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

Sec. 1½. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 2. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Sec. 3. The following terms, as used in this act, are hereby defined as follows:

'Producer' means grower, baker, maker, manufacturer or publisher.

'Commodity' means any subject of commerce.

Sec. 4. If any provision of this act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Sec. 5. This act may be known and cited as the 'Fair Trade Act.'"

Specification of Errors.

1. The state Supreme Court erred in reversing the judgment of the Superior Court dismissing the complaint herein. [R. 11.]

2. Said Supreme Court erred in holding that section 1½ of the Fair Trade Act was not repugnant to Article XIV of Amendments to the Constitution of the United States, and did not deny due process of law to appellant. [R. 11.]

3. Said Supreme Court erred in holding that the Fair Trade Act did not deny to appellant the equal protection of the laws within the meaning of Article XIV of Amendments to the Constitution of the United States. [R. 11.]

Question Presented.

The sole question presented here is whether a state legislature, consistently with the due process and equal protection clauses of the Fourteenth Amendment, can empower private persons in their absolute and uncontrolled discretion to fix the selling price of all ordinary commodities owned and offered for sale by another in the ordinary course of retail business merely because the commodities bear the producer's trademark, name or brand.

Summary of the Argument.

The Fair Trade Act is repugnant to the due process clause of the Fourteenth Amendment because it is arbitrary, unreasonable and capricious and without real or substantial relation to its alleged purpose. The act is defective in these particulars because: (1) It vests in the producer of, and competing dealers in, trademarked, branded or named commodities the power to fix and control the price at which appellant may sell these commodities, notwithstanding that appellant is the owner of them and has not agreed in any way to maintain their price, and this without any standard set up in the statute or any supervision by the state. (2) Notwithstanding the allegation that the statute is designed to prevent the evils thought to flow only from the use of trademarked commodities as "leaders" or "loss leaders", it is in terms applicable to all selling at prices less than those fixed by the producer, without regard to motive or result, and, in the case at bar, has been applied as against a dealer who is not alleged either to have used the product in question as a "leader" or to have sold it below cost. (3) It is in effect a price-fixing statute applicable generally, without regard to the necessity for such regulation or the interest of the public in the industries and trades affected.

The act also is repugnant to the equal protection clause of the Fourteenth Amendment because it exempts price-fixing agreements in respect of trademarked or named commodities from the provisions of the state's general anti-trust law while leaving in force the prohibition against such agreements in respect of similar commodities not so marked or named.

ARGUMENT.

I.

Section 1½ of the Fair Trade Act Is Repugnant to the Due Process Clause of the Fourteenth Amendment.

From the complaint and from the opinions of the court below, it is made to appear that the primary purpose of the Fair Trade Act is to protect producers, retailers and the public from the injurious consequences thought to follow from the practice of "leader" or "loss leader" merchandising of trademarked articles. [R. 2-3; *Max Factor & Co. v. Kunsman, supra,* 91 California Decisions, at 348-9, 55 P. (2d) at 179, Jurisdictional Statement, p.17.] Nothing in the language of the statute bears out this characterization of its purpose. On the contrary, as we show later [*post,* pp. 18-22; 26], the act in its necessary operation and effect goes much farther. But for the purpose of testing its validity upon the footing on which it is sought to be defended, we may, for the moment, accept the pleaded characterization.

There is undoubtedly a sharp conflict of opinion as to whether so-called price-cutting by retailers is an evil and price maintenance economically desirable.[4] With the wis-

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4. Discussions of this subject may be found in HARING, *Retail Price Cutting and Its Control by Manufacturers,* p. 12 *et seq.*; MURCHISON, *Resale Price Maintenance,* Columbia Univ., Studies in History, Economics and Public Law, vol. 82, no. 2, pp. 21-84; SELIGMAN AND LOVE, *Price Cutting and Price Maintenance, passim;* FEDERAL TRADE COMMISSION, *Report on Resale Price Maintenance,* Part II, pp. 4-5; 10 New York Univ. Law Quarterly, 502, 506; *Encyclopedia of the Social Sciences,* vol. 13, p. 326.

dom of the choice which the legislature has made in that regard we are not concerned here. We are very much concerned, however, with the question of whether in putting that choice into effect the legislature has exceeded the constitutional limits of its power.

In order to suppress the asserted evils with which the statute is supposed to deal the legislature has not only validated voluntarily executed contracts fixing the resale price of branded goods, but has also declared that anyone, even if he is not a party to any such contract, who knowingly and wilfully sells the same brand of goods at prices lower than those fixed in any contract between other people, is engaging in unfair competition, actionable at the suit of any person damaged thereby. It is with this latter aspect of the statute that this case deals.

In arguing that such a statute deprives the appellant of its liberty and property without due process of law, the legitimacy of the alleged legislative purpose and the power to accomplish it may, for argument's sake only, be assumed. Even upon this assumption it would still be necessary, before a statute like the one here challenged could be said to be constitutional, to find that "the means selected . . . have a real and substantial relation to the object sought to be attained" and that they are not "unreasonable, arbitrary or capricious." [*Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 347, 79 L. Ed. 1468, 1475, 55 S. Ct. 758, 761-2, note 5; *Nebbia v. New York*, 291 U. S. 502, 525, 78 L. Ed. 940, 950, 54 S. Ct. 505, 510-11, 89 A. L. R. 1469, 1476; *Louis K. Liggett Co. v. Baldridge*, 278 U. S. 105, 111-113, 73 L. Ed. 204, 208-9, 49 S. Ct. 57, 59; *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504, 513, 68 L. Ed. 813, 826, 44

S. Ct. 412, 413, 32 A. L. R. 661, 664; *Meyer v. Nebraska,* 262 U. S. 390, 399-400, 401, 67 L. Ed. 1042, 1045, 1046, 43 S. Ct. 625, 627, 29 A. L. R. 1446, 1450, 1451; *Pierce v. Society of Sisters of Holy Names,* 268 U. S. 510, 535, 69 L. Ed. 1070, 1078, 45 S. Ct. 571, 573, 39 A. L. R. 468, 476; *Nectow v. Cambridge,* 271 U. S. 183, 188, 72 L. Ed. 842, 844, 48 S. Ct. 447, 448.]

That the means by which the purpose of the Fair Trade Act is to be accomplished are arbitrary, capricious, and unreasonable and without real or substantial relation to the object of the statute may, we believe, be readily demonstrated.

A. The Delegation to Third Persons of the Power to Control Another's Property Is an Arbitrary Denial of Due Process.

The Fair Trade Act neither declares price-cutting as such to be obnoxious to the public interest nor prohibits the act of cutting prices. Instead, and in necessary effect, it delegates to the producer and to any competing dealer the power, first, to fix the price which shall prevail in respect of any particular commodity, and second, by appropriate suits in equity or actions at law, to compel—not necessarily *all* dealers—but such dealers as they may select to adhere to that price.

The statute sets up no standard by which the action of the person demanding price maintenance is to be guided. For all that appears in the act, adherence may be required of all non-assenting dealers, or of only some of them. The moving party, be he producer or competitor, is left free to act or not, as he sees fit. He may be prompted to act by proper considerations or he may be

moved solely or largely by self-interest, by whim, or even by malice or spite. In either event, the choice rests with him and the non-assenting dealer is made subject to that choice.

The price that is fixed may be high or low, but whatever it is, the dealer, whose freedom of action is thereby affected, has no voice in the fixing, nor is he given the protection of any governmental supervision of the process. Uniformity of price is not a condition of resort to the statute. The producer may fix as many different prices as he has contracts; the non-assenting dealer may be compelled to adhere to the price fixed in "any contract", in other words, to such one of the varying prices as the producer or a competitor may select.

It is very plain, therefore, that what the Fair Trade Act does is to give to third persons the uncontrolled power over the property of another. In the ordinary case—and certainly in the case at bar—the retail dealer is the owner of the goods which he keeps for sale. He may acquire them, as in this case the appellant did, free of agreements restricting their subsequent disposition. [R. 4.] Being the owner, and not having bound himself to do otherwise, he may ordinarily fix his own price. The privilege so to do is one of the inherent attributes of the ownership of property. [*Tyson & Bro. v. Banton*, 273 U. S. 418, 429, 71 L. Ed. 718, 722, 47 S. Ct. 426, 428, 58 A. L. R. 1236, 1241; *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 537-8, 67 L. Ed. 1103, 1109, 43 S. Ct. 630, 633-4, 27 A. L. R. 1280, 1287.]

Granting, for argument's sake, that this right or privilege of fixing one's own price may be restricted in the public interest, it does not follow that the restriction may take

the form of a delegation of the power of control to a third party. In the very nature of things, control of the property of one person at the discretion or whim of another, who may even be a competitor of the former, is an arbitrary limitation upon the controlled person's liberty. It is arbitrary because it leaves to an interested—perhaps adversely interested—private person the power of imposing a restriction on another's liberty, without any assurance that his action will be guided by those considerations of public welfare which furnish the only justification for permitting the restriction at all.

A delegation of power in all respects analogous to the one here involved was but recently said by this Court to be "so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause" as to need no more than a reference "to decisions of this court which foreclose the question." [*Carter v. Carter Coal Co.*, 298 U. S. ....., 80 L. Ed. (Adv. Ops.) 749, 769-70, 773, 56 S. Ct. (Adv. Ops.) 855, 872-3, 876.] In that case, it will be recalled, an Act of Congress empowered a majority of coal producers and miners to fix minimum wages and maximum hours of labor which, when fixed, should bind all. The legislation, although confined to a single distressed major industry and a single commodity, was struck down, in this particular, because of the arbitrary nature of the method by which wages and hours were established. The Fair Trade Act, we submit, is not in this respect essentially different.

Nor is there any difference in principle between the Fair Trade Act and the legislation considered in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 73 L. Ed. 210, 49 S. Ct. 50, 86 A. L. R. 654, and in

Eubank v. Richmond, 226 U. S. 137, 57 L. Ed. 156, 33 S. Ct. 76, Ann. Cas. 1914B, 192, 42 L. R. A. (N. S.) 1123. In each of those cases the statute involved gave to third persons the power to curtail or regulate the use which another could make of his own property; and in each of them the delegation was held to be arbitrary, and, therefore, repugnant to the Fourteenth Amendment, even though the purpose in aid of which the power was given, was, generally speaking, within the sphere of legitimate state action. See, also, *Southern R. Co. v. Virginia ex rel. Shirley,* 290 U. S. 190, 194-7, 78 L. Ed. 260, 264-6, 54 S. Ct. 148, 149-51; *Doubleday-Doran & Co. Inc. v. R. H. Macy & Co.,* 269 N. Y. 272, 199 N. E. 409, 103 A. L. R. 1325; *Johnson & Johnson v. Weissbard,* .... N. J. Eq. ...., 184 Atl. 783.

It is no answer to the argument made here that ample safeguards against arbitrary exertion of the delegated power may be provided by the court before whom any particular case is heard, either by denying injunctive relief when it would be inequitable not to do so or by appropriate conditions inserted in its decree. No such flexible power is purported to be given by the statute, nor is the relief which may be had limited to the discretionary remedies available in a court of equity. An action at law will lie too. [Sec. 1½, *ante,* p. 8.] And in any event, the constitutional rights of a litigant must be preserved by the statute itself—it is not enough to leave them to the discretion of the courts. [*Louisville & Nashville R. R. v. Central Stockyards Co.,* 212 U. S. 132, 144, 53 L. Ed. 441, 446, 29 S. Ct. 246, 248. And compare *Southern R. Co. v. Virginia ex rel. Shirley, supra,* 290 U. S. at 198-9, 78 L. Ed. at 266, 54 S. Ct. at 151.]

Nor is it any answer to say, as appellee has said, that the presence of the producer's trademark on the goods in some way justifies the delegation to him of the power to control their resale even after title has passed. To begin with, such an answer overlooks the fact that the trademark owner is not the only person in whom the statute vests this power—any other dealer in the same commodity is similarly empowered. In fact, in the case at bar the appellee is not the owner of the Pyroil trademark, but is apparently a jobber and retailer. [R. 1-2.] Furthermore, it is not even necessary that the producer have a trademark or that the mark, if he has one, be on the article. It is enough, for the purposes of the Fair Trade Act, if only his name appear somewhere on the commodity or on its label. That name, or even the mark itself, may be so new, so little used or so unknown to the public as not to be entitled to protection as a trademark or tradename. Yet, it is said, its mere presence is sufficient to give the producer such an interest in property owned by another as to justify restriction of the latter's freedom of use at the whim of the former.

The basic flaw in appellee's argument, however, is that it involves a misconception of the true nature of a trademark. A trademark is a mark of origin only. It does not give to its owner any greater rights in the article to which it is attached than if the article had been sold without it. The owner of trademarked goods may use them as he sees fit, so long, of course, as he tells the truth about them. His freedom in this respect has never been thought to be restricted by the presence of another's mark. [*Prestonettes Inc. v. De Sputorno Coty*, 264 U. S. 359, 368, 68 L. Ed. 731, 741-2, 44 S. Ct. 350, 351; *United*

Drug Co. v. Rectanus Co., 248 U. S. 90, 97-8, 63 L. Ed. 141, 39 S. Ct. 48, 50-1.] It is quite plain, therefore, that a trademark furnishes no such connection between its owner and the goods to which it is affixed as to leave in him any right or interest in the goods after he has parted with title; from which it follows, that there is nothing upon which to base any justification for the grant to him of the power to control property that he no longer owns.

B. The Statute Is Arbitrary Because It Unnecessarily and Unreasonably Restricts the Right to Carry on Business by Methods Essentially Fair in Their Nature.

It has been previously noted that the alleged purpose of the Fair Trade Act is to eliminate the injurious consequences thought to follow from "predatory" price-cutting. The statute, however, is not so limited. All price-cutting, i. e., any sale below the standard fixed in any contract entered into in pursuance of section 1, is declared, in section 1½, to be "unfair competition" and, therefore, actionable. In adopting this method of approach, the act completely ignores the requirement, already adverted to [*ante*, p. 12], that the selected means shall have a real and reasonable relation to the object sought to be accomplished.

Successful competition, even when it is admittedly fair, produces damage in the sense that one dealer has lost custom to another. It is apparent, therefore, that the act may be availed of to interdict price competition as such, without regard to whether it is in fact "fair" or "unfair". It will not be contended, we suppose, that a method of doing business which is traditionally and essentially fair in its nature can be transformed into an act

of unfairness and illegality merely by characterizing it as the latter in some statute. [Compare, *Manley* v. *Georgia,* 279 U. S. 1, 6, 73 L. Ed. 575, 578, 49 S. Ct. 215, 217.] To determine whether a statute which purports to accomplish that transformation is constitutional or whether it prescribes an unreasonable restriction on the right to carry on an otherwise lawful business, the real nature of the prohibited conduct must be looked at. [See, *McFarland v. American Sugar Co.,* 241 U. S. 79, 86, 60 L. Ed. 899, 904, 36 S. Ct. 498, 501; *Jay Burns Baking Co. v. Bryan, supra,* 264 U. S., at 513, 68 L. Ed. at 826, 44 S. C. at 413, 32 A. L. R. at 664; *Meyer v. Nebraska, supra,* 262 U. S. at 399, 67 L. Ed. at 1045, 43 S. Ct. at 626-7, 29 A. L. R. at 1449-50. And compare, *A. L. A. Schecter Poultry Corp. v. United States,* 295 U. S. 495, 531-3, 79 L. Ed. 1570, 1580-1, 55 S. Ct. 837, 843-4, 97 A. L. R. 947, 957-9.]

In making such an inquiry, this Court, of course, may look to facts of common knowledge, for "Invalidity may be shown by things which will be judicially noticed. . . ." [*Weaver v. Palmer Bros. Co.,* 270 U. S. 402, 410, 70 L. Ed. 654, 656, 46 S. Ct. 320, 321. See, also: *Borden's Farm Products Co. v. Baldwin,* 293 U. S. 194, 209, 79 L. Ed. 281, 288, 55 S. Ct. 187, 191-2.] The ordinary methods of doing business, the existence of general trade practices and conditions, and the varying types of businesses, all fall within the category of matters judicially noticed. [*Nicol v. Ames,* 173 U. S. 509, 516-7, 43 L. Ed. 786, 792, 19 S. Ct. 522, 526; *Texas & P. R. Co. v. Pottorff,* 291 U. S. 245, 254, 78 L. Ed. 777, 782, 54 S. Ct. 416, 417; *Hardware D. Mut. F. Ins. Co. v. Glidden Co.,* 284 U. S. 151, 159, 76 L. Ed. 214, 219, 52 S. Ct.

69, 71; *Southern Ry. Co. v. United States,* 222 U. S. 20, 27, 56 L. Ed. 72, 75, 32 S. Ct. 2, 4; *Pennsylvania R. R. v. Sonman Shaft Coal Co.,* 242 U. S. 120, 127, 61 L. Ed. 188, 192, 37 S. Ct. 46, 49.]

Resorting to these permitted sources of knowledge, we think it can be shown that while some forms of price competition may, perhaps, be so destructive and unfair as to be subject to regulation, there are still forms of this competition which cannot be so described but which nevertheless are caught within the broad sweep of the challenged statute.

A difference in the price at which the same commodity is offered by various dealers may be, and frequently is, accounted for, not by the existence of a predatory or destructive intent, but by a difference in the method of conducting the business.[5] One dealer may sell for cash and render no services other than the sale of the article. Another may extend credit, accept telephone orders and orders on approval, deliver the goods to the purchaser's home and so forth. Again, one dealer may cater primarily to the wealthy who desire and are willing to pay for personal service, lavish surroundings and an atmosphere of exclusiveness, while another makes his appeal to people more modestly situated. One dealer may be located in a low or moderate rent district, another in a high rent

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5. The economic and statistical data upon which the statements to follow are based have been collected in the appendix to this brief. For the most part, no specific reference to these sources will be made in the general argument.

area. One may confine his operations to a single article or class of articles, the other extend his to many and varied lines.

All of these factors, and many more like them, necessarily have their effect on price. The result is a varying price level in respect of the same commodity—but it is a variation having nothing to do with the motives, and producing none of the consequences, which are thought to be found in "predatory" price-cutting. Certainly the dealer who charges less because he gives less cannot, in any realistic view, be said to be engaging in "unfair competition." [Compare, *Federal Trade Commission v. Gratz,* 253 U. S. 421, 427-8, 429, 64 L. Ed. 993, 996, 40 Sup. Ct. 572, 575; SELIGMAN AND LOVE, *Price Cutting and Price Maintenance,* pp. 114-5, *post* Appendix pp. 54-5; STEVENS, *Resale Price Maintenance as Unfair Competition,* 19 Columbia Law Review 265, 268-9, *post* Appendix pp. 53-4.]

The cost of doing business inevitably affects the price. The efficient and economical dealer who is able to maintain a proper margin of profit at a lower price than some other less efficient dealer, is not an unknown phenomenon. The costs of operation, all available data show, vary greatly not only as between different classes of business but even as between individual units within the same class, as well as in different localities within the state. In view of facts such as these, it would be a concept entirely foreign to our accepted ideas of competition to hold that the dealer who passes on his operation economies in the form of a lower price is competing "unfairly" with a dealer whose costs force him to charge more.

Nothing is more common in all lines of retail trade than the occasional, often seasonal, necessity of converting stock on hand into cash. The customary method of accomplishing that result is the "sale" at which all or selected lines of merchandise are offered at reduced prices for a limited period of time. There is nothing of predatory or destructive intent in such a practice. On the contrary, it is necessary and beneficial because it enables each individual dealer to adjust his business to unusual, as well as usual, variations in consumer demand. Frequently, it is the only method by which the merchant is able to raise the funds necessary to meet current obligations and to continue in business. Yet, a competitor, proceeding under the Fair Trade Act, could require it to be stopped. None of the exceptions contained in section 1 apply to such a situation since a "sale" under these circumstances would be neither a "close-out", a "damaged goods" nor a court sale.

To put the matter briefly, it is within the judicial knowledge of this Court that the mere fact of lower price is not always, or by itself, indicative of unfair or predatory competition; it may be, and frequently is, indicative of nothing more than efficient operation, alert merchandising, or minimum-service selling. The Fair Trade Act, however, by the simple expedient of denominating all sales below a price fixed in any contract between others "unfair competition", ignores these real differences in the nature of the general act which it prohibits and leaves it open to the producer or a competing dealer to compel cessation of the legitimate form of price-competition as well as the illegitimate.

The principle which governs a situation of this sort is succinctly stated in the following excerpt from *Tyson & Bro. v. Banton, supra,* 273 U. S. at 443, 71 L. Ed. at 728, 47 S. Ct. at 432, 58 A. L. R. at 1248:

> ". . . One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence . . . and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers may also be caught."

This is the principle which, in *Fairmont Creamery Co. v. Minnesota,* 274 U. S. 1, 71 L. Ed. 893, 47 S. Ct. 506, 52 A. L. R. 163, served to invalidate a statute very much like the one here in question. There the legislature had prohibited any discrimination in the prices paid for milk as between different communities or localities within the state. The evil aimed at by that statute was the destruction of competition brought about by the practice of powerful milk buyers paying excessive prices for the purpose of forestalling less powerful buyers. The statute, however, applied to all discriminations in the prices paid for milk, regardless of motive or intent. In that broad reach, the act was held to be unconstitutional because it had "no reasonable relation to the anticipated evil . . ." See, also, *Williams v. Standard Oil Co.,* 278 U. S. 235, 244, 73 L. Ed. 287, 310, 49 S. Ct. 115, 118, 60 A. L. R. 596, 605. And compare, *Central Lumber Co. v. South Dakota,* 226 U. S. 157, 57 L. Ed. 164, 33 S. Ct. 66, where a similar statute, properly limited in scope, was upheld.

Many instances of the application of this principle are to be found in the books. Thus, the perfectly proper purpose of preventing evasion of tax or regulatory statutes has several times been held not to justify such an extension of the restrictive provisions of the law as to bring within its reach persons not in fact guilty of the practices aimed at. [*Hoeper v. Tax Commission,* 284 U. S. 206, 216-7, 76 L. Ed. 248, 251-2, 52 S. Ct. 120, 122, 78 A. L. R. 346, 349; *Heiner v. Donnan,* 285 U. S. 312, 325, 327-8, 76 L. Ed. 772, 778, 780, 52 S. Ct. 358, 360; *Schlesinger v. Wisconsin,* 270 U. S. 230, 240, 70 L. Ed. 557, 564, 46 S. Ct. 260, 261, 43 A. L. R. 1224, 1227-8; *Weaver v. Palmer Bros., supra,* 270 U. S. at 414-5, 70 L. Ed. at 658, 46 S. Ct. at 323; *Jay Burns Baking Co. v. Bryan, supra,* 264 U. S. at 513, 516-7, 68 L. Ed. at 826, 828, 44 S. Ct. at 414-15, 32 A. L. R. at 664, 666; *Railroad Retirement Board v. Alton R. Co., supra,* 295 U. S. at 348-9, 389, 79 L. Ed. at 1475-6, 1497, 55 S. Ct. at 762, 779-80.]

Nor does the fact that abuses or evils exist in connection with certain classes of otherwise harmless business warrant the complete prohibition of the right to carry on that business, or the imposition of unnecessary and unreasonable restrictions upon its operation. The evils may be the subject of appropriate regulation, but the conduct of the business by non-injurious methods cannot be enjoined. [*Louis K. Liggett Co. v. Baldridge, supra,* 278 U. S. at 112-3, 73 L. Ed. at 208-9, 49 S. Ct. at 59; *Ribnik v. McBride,* 277 U. S. 350, 358 72 L. Ed. 913, 916, 48 S. Ct. 545, 547; *New State Ice Co. v. Liebmann,* 285 U. S. 262, 278-80, 76 L. Ed. 747, 754, 52 S. Ct. 371, 374-5; *Adams v. Tanner,* 244 U. S. 590, 594, 61 L. Ed. 1336, 1343, 37 S. Ct. 662, 664.]

The application of the principle exemplified by the foregoing decisions is not prevented, in the case at bar, by appellee's suggestion, made below, that since the appellant is charged with price-cutting for "the purpose of interfering with, and disrupting, plaintiff's said contracts and business .. . ." [R. 4], it is in no position to raise the question. The relief allowed under the statute is not dependent in any way on pleading or proof of any such purpose; it may be had as well when that or any similar purpose is absent as when it is present. In either event, the appellant is entitled to have the constitutionality of the statute tested by its operation and effect. [*Near v. Minnesota ex rel. Olson,* 283 U. S. 697, 708-9, 723, 75 L. Ed. 1357, 1363-4, 1371, 51 S. Ct. 625, 628, 633.] In other words, constitutionality is to be tested by what may be done under the authority of the statute, not necessarily by what has actually been done; and in determining what may be done, the Court is not confined to the facts of the case before it. [*Eubank v. Richmond, supra,* 226 U. S. at 144, 57 L. Ed. at 159, 33 S. Ct. at 77, Ann. Cas. 1914B, at 194, 42 L. R. A. (N. S.) at 1126; *Bailey v. Alabama,* 219 U. S. 219, 235, 238, 244-5, 55 L. Ed. 191, 199, 200, 202, 31 S. Ct. 145, 149, 153. And compare, *Tumey v. Ohio,* 273 U. S. 510, 533, 71 L. Ed. 749, 759, 47 S. Ct. 437, 445, 50 A. L. R. 1243, 1255-6; *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 423-4, 59 L. Ed. 1027, 1031, 35 S. Ct. 625, 628-9; *Miller v. Horton,* 152 Mass. 540, 546, 26 N. E. 100, 102, 23 Am. St. Rep. 850, 855, 10 L. R. A. 116, 118, per Holmes, J.]

In this connection, it is not without significance that, notwithstanding the general averment of appellant's purpose, there is no allegation that the appellant indulged in

either of the practices said to be specially aimed at by the Fair-Trade Act. There is no charge either of "leader" or "loss leader" merchandising or of selling below cost; nor is there any allegation that the price charged by appellant was unreasonably or unnecessarily low. Presumably appellee pleaded the strongest case open to it. [*Higgins v. Security Trust etc. Bank,* 203 Cal. 398, 401, 264 Pac. 744, 745-6.] It follows, therefore, that appellant must be deemed not to have done these things with which the statute is supposed particularly to deal, and in consequence, that it is directly within the class of innocent persons whose rights are infringed by the statute.

C. The Act Is in Effect a Price-fixing Statute and as Such Is Arbitrary and Beyond the Power of the Legislature.

It may or may not be true, as was suggested by the state Supreme Court, that the Fair Trade Act does not aim primarily at regulating prices. It cannot be denied, however, that the act seeks to accomplish whatever purpose it has by the method of fixing and enforcing minimum resale-price levels. In necessary effect, therefore, it is a price-fixing statute and its validity must be determined on that footing. [*Fairmont Creamery Co. v. Minnesota, supra,* 274 U. S. at 8-9, 71 L. Ed. at 896-7, 47 S. Ct. at 508, 52 A. L. R. at 167; *Doubleday-Doran & Co. Inc. v. R. H. Macy & Co., supra,* 269 N. Y. at 281, 199 N. E. at 411; *Johnson & Johnson v. Weissbard, supra,* 184 Atl. at 787, 788-9.]

Prior to the decision in *Nebbia v. New York, supra,* it was pretty definitely established that the power of the state to fix or regulate the price at which ordinary com-

modities might be sold was limited to businesses affected with a public interest. [*Tyson & Bro. v. Banton, supra,* 273 U. S. at 430, 71 L. Ed. at 722, 47 S. Ct. at 428, 58 A. L. R. at 1241; *Wolff Packing Co. v. Court of Industrial Relations, supra,* 262 U. S. at 535-8, 67 L. Ed. at 1108-9, 43 S. Ct. at 632-4, 27 A. L. R. at 1287; *Williams v. Standard Oil Co., supra,* 278 U. S. at 239-40, 73 L. Ed. at 308, 49 S. Ct. at 116, 60 A. L. R. at 602; *Ribnik v. McBride, supra,* 277 U. S. at 355-6, 72 L. Ed. at 915, 48 S. Ct. at 545-6; *German Alliance Ins. Co. v. Kansas,* 233 U. S. 389, 406, 58 L. Ed. 1011, 1019-20, 34 S. Ct. 612, 617; *Budd v. New York,* 143 U. S. 517, 533-4, 36 L. Ed. 247, 252, 12 S. Ct. 468, 471-2; *Munn v. Illinois,* 94 U. S. 113, 125-30, 24 L. Ed. 77, 84-6.] In the *Nebbia* case, however, it was said that the phrase "affected with a public interest" meant nothing more than "subject to the police power" and that, accordingly, it remained the function of the courts "to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." The prior decisions which might be thought to have indicated a somewhat different approach were explained as resting "finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect." [*Nebbia v. New York, supra,* 291 U. S. at 536-7, 78 L. Ed. at 956-7, 54 S. Ct. at 515-6, 89 A. L. R. at 1483.]

Since that decision the statute there sustained has been characterized as "a temporary expedient to redress an injurious economic condition . . ." [*Borden's Farm Products Co. v. Ten Eyck,* 297 U. S. 251, 261, 80 L. Ed.

(Adv. Ops.) 469, 472, 56 S. Ct. (Adv. Ops.) 453, 455], and the authority of a prior decision advancing the public interest formula has been availed of to invalidate a law fixing minimum wages for women. [*Morehead v. People ex rel. Tipaldo,* 298 U. S. ....., 80 L. Ed. (Adv. Ops.) 921, 926, 929-30, 56 S. Ct. (Adv. Ops.) 918, 923, 926.]

In this state of the authorities it is proper to say, we believe that, emergencies apart, the privilege of the ordinary trader to fix his own price is still beyond the regulatory power of the state except where the business is one affected with a public interest, or where special circumstances surrounding a particular business reasonably require that special form of regulation. The mere fact, therefore, that price-fixing has been sustained in any particular case does not mean that the same type of regulation will be permitted in respect of some other business or even of the same business under different circumstances. [*Nebbia v. New York, supra,* 291 U. S., at 525, 536, 78 L. Ed. at 950, 956, 54 S. Ct. at 510, 515, 89 A. L. R. at 1476, 1482; *Darweger v. Staats,* 267 N. Y. 290, 308, 196 N. E. 61, 67.]

Thus, for instance, in *Munn v. Illinois, supra,* the essential nature of the service rendered by grain elevators and their peculiar situation which permitted them to dominate the entire process of marketing grain, sufficed to create such a public interest as would justify rate regulation. Similarly, in *German Alliance Ins. Co. v. Kansas, supra,* the social necessity for insurance, the interdependent nature of that business, the extreme importance of the premium rate as a factor in the calculations upon which the insurer's ability to comply with his contract de-

pended, and the absence of ordinary bargaining as an element in the process of fixing the premium, made the matter one of sufficient interest to the public to warrant regulation of prices. In *Nebbia v. New York, supra,* price-fixing as a "temporary expedient" was thought warranted because milk was an essential commodity, low prices threatened a relaxation of vigilance against contamination, the business was of paramount importance to the economic and credit structure of the state as a whole, and the peculiar make-up of the business tended to instability of prices if the price term of the contract was left to the ordinary play of the law of supply and demand.

On the other hand, in the cases in which price-regulation was not sustained, the absence of any elements touching the public interest, such as those noticed above, resulted in a finding that the various statutes were arbitrary restrictions on the right to carry on a lawful business. The situation in the instant case falls much more nearly within the principle of this last group of decisions than those in which price-fixing was upheld. There is no element of emergency, of an essential commodity, of a business vital to the state's economic existence, or of anything of like purport in the instant case. There is only the bare fact that as to a business dealing in an ordinary and far from essential commodity the price to be charged the public, at least the minimum price which may be charged, is to be fixed by persons other than the seller. Nowhere is there any suggestion of such a relation to the public welfare as might justify this limitation upon the ordinary trader's right to run his business in his own way. That abuses of this right exist and produce injury is no justification; for while this fact may be suf-

ficient to warrant legislation hitting directly and only at those abuses, it will not uphold legislation which goes beyond the necessities of the occasion by restricting and in effect destroying a valuable attribute of the right to do business at all. [*Tyson & Bro. v. Banton, supra,* 273 U. S. at 442-3, 71 L. Ed. at 728, 47 S. Ct. at 432, 58 A. L. R. at 1248; *Ribnik v. McBride, supra,* 277 U. S. at 358, 72 L. Ed. at 916, 48 S. Ct. at 547.]

The arbitrary character of the Fair Trade Act is further emphasized by the fact that it is a universal, undiscriminating requirement of price-fixing in all businesses in which branded goods are sold—which means, of course, in virtually all business. No decision of this court has gone so far in sustaining price-fixing legislation. The category of businesses which may be constitutionally subjected to price-regulation is not a closed one—but whether or not any specific business is within that category is a question to be determined upon the special facts relating to it. The Fair Trade Act, however, completely ignores the obvious fact that all businesses are not alike either in their internal make-up or in their relation to the community at large, and that this circumstance must play an important role in any decision on price-fixing legislation.

To sustain the Fair Trade Act as a price-fixing measure it would be necessary to repudiate the principle, recognized in every decision of this Court on the subject, that all businesses and all ordinary commodities are not necessarily so situated as to require or justify price control. What-

ever the price-fixing power of the state may be, it certainly is not an unlimited and all-embracing power available in all cases and under all circumstances. The Fair Trade Act, however, is postulated on the contrary assumption, and because of that fact it transcends the limits of the Fourteenth Amendment.

D. The Statute Cannot Be Defended as a Codification or Extension of the Common Law.

It was suggested below that the Fair Trade Act was no more than a statutory extension of the common law doctrine of unjustifiable interference with contracts. [*Max Factor & Co. v. Kunsman, supra,* 91 Califoria Decisions at 356, 55 P. (2d) at 185, Jurisdictional Statement, p. 30.] In point of fact, however, the statute goes far beyond the broadest limits of this doctrine, and while that circumstance does not necessarily stamp the act as unconstitutional it does demonstrate that its constitutionality must be determined on its own footing.

To bring the common law rule of interference with contracts into operation there must be an intentional interference, a proximately resulting breach of contract, and an absence of justification. Competition—at least the ordinary competition of trade—is a complete justification within the meaning of this rule. [*Passaic Print Works v. Ely* (C. C. A. 8), 44 C. C. A. 426, 105 Fed. 163 (certiorari denied, 181 U. S. 617, 45 L. Ed. 1029, 21 S. Ct. 922); *Beardsley v. Kilmer,* 236 N. Y. 80, 140 N. E. 203, 27 A. L. R. 1411; *Katz v. Kapper,* 7 Cal. App. (2d) 1, 44 P. (2d) 1060; *Boyson v. Thorn,* 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; *Martell v. White,* 185 Mass. 260, 69 N. E. 1087, 102 Am. St. Rep. 346, 64

L. R. A. 263; *Sorrell v. Smith* [1925], App. Cas. 700; *Sweeney v. Smith* (C. C.), 167 Fed. 385, 386-8, affirmed (C. C. A. 3) 171 Fed. 645, certiorari denied, 215 U. S. 600, 54 L. Ed. 343, 30 S. Ct. 400; *Lamport v. 4175 Broadway, Inc.*, 6 F. Supp. 923, 924.] Under the Fair Trade Act, however, it is clear that price-cutting as such is actionable even though it be done in the course of ordinary competition and without any intent to interfere with, or induce the breach of, another dealer's contract, and even though no breach of any contract be in fact induced. Obviously, the statute was intended to reach, and it does reach, far beyond the boundaries of the common law in this respect.

It has also been suggested below, by counsel for appellee, that the act might be sustained as merely an extension to chattels of the doctrine of equitable servitudes. Here it cannot be claimed that the common law goes so far since manifestly it does not. [*Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 404-5, 55 L. Ed. 502, 517-8, 31 S. Ct. 376, 383; *John D. Park & Sons Co. v. Hartman* (C. C. A. 6), 82 C. C. A. 158, 172-3, 153 Fed. 24, 38-9, 12 L. R. A. (N. S.) 135, 145-6; *Garst v. Hall & Lyon*, 179 Mass. 585, 590-1, 61 N. E. 219, 220, 55 L. R. A. 631, 637-8; *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Company, Ltd.* [1915], App. Cas. 847; *Taddy & Co. v. Sterious & Co.* [1904], 1 Ch. 354, 358; *McGruther v. Pitcher* [1904], 2 Ch. 306.] Even the application, by analogy, of the doctrine as it exists in respect of land would not cover the whole field to which the Fair Trade Act extends. Upon such an analogy it would be necessary that the *specific chattels* in question should have been originally restricted

as to their resale price, that the subvendee sought to be charged should have taken them with knowledge of the restriction, and that the one imposing the servitude should be the owner of a dominant tenement to be benefited. [See, generally, ZECHARIAH CHAFEE, JR., *Equitable Servitudes on Chattels,* 41 Harvard Law Review 945.]

None of these conditions need exist as a prerequisite of relief under the Fair Trade Act. The commodity offered at the cut-price may have been sold by the producer in the first instance without restriction as to resale price;[6] or the price-cutter may have purchased it without knowledge of any restriction. Yet, if at the time of any resale he knows that in some contract between the producer and another the minimum resale price of the same brand of commodity has been fixed, he is bound by that price. It is also difficult, in the ordinary situation comprehended by the statute, to discover any dominant tenement for the benefit of which the restriction is imposed.

Here, again, it is well to repeat that the mere fact that the Fair Trade Act is much broader in scope than the common law or equitable doctrines cited does not establish it as unconstitutional. By the same token, however, the constitutionality of the statute cannot be defended simply upon the ground that it is a codification, directly or by analogy, of existing common law or equitable principles. Going, as it does, far beyond these principles, its validity must be tested by other considerations entirely.

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6. Presumably that was the situation in the case at bar since the contrary was not alleged.

II.

The Fair Trade Act Denies Appellant the Equal Protection of the Laws.

Prior to the enactment of the Fair Trade Act, a system of agreements by which the resale price of any article of commerce was fixed would have been void in California as violative of the state's anti-trust law. [*Cartwright Act*,[7] Calif. Stats., 1907, c. 530, p. 984, sec. 1; Calif. Stats., 1909, c. 362, p. 593, sec. 1; Deering's General Laws of California, Act 8702, p. 4902, sec. 1. *People v. H. Jevne & Co.*, 179 Cal. 621, 178 Pac. 517.] By virtue of the Fair Trade Act such agreements, in respect of articles bearing, or the labels or content of which

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7. The relevant provisions of this statute are as follows:

> "A trust is a combination of capital, skill or acts by two or more persons . . . for either, any or all of the following purposes:
>
> "1. To create or carry out restrictions in trade or commerce.
>
> "2. To . . . increase the price of merchandise or of any commodity.
>
> "3. To prevent competition in . . . sale or purchase of merchandise, produce or any commodity.
>
> "4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity . . . intended for sale, barter, use or consumption in this state.
>
> "5. To make or enter into or execute or carry out any contracts . . . . by which they shall bind themselves not to sell . . . any article . . . below a common standard figure, or fixed value, or

bear, the trademark, name or brand of the producer, are exempted from the provisions of the anti-trust law. [Sec. 1, *ante*, p. 7.] Similar agreements in respect of any other article of commerce are unaffected by this exemption.

There is, therefore, a plain discrimination between dealers who sell articles falling within the purview of the Fair Trade Act and other classes of dealers. The former may be restricted in their privilege of fixing their own prices, by agreements to which they are not parties, while the latter cannot be so limited in their freedom. Such a discrimination is a denial to the first class of dealers (within which class comes the appellant) of the

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by which they shall agree in any manner to keep the price of such article . . . at a fixed or graduated figure . . . so as to directly and indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale . . . of any such article. . . . Every such trust as is defined herein is declared to be unlawful. against public policy and void, . . ."

Grogan v. Chaffee, 156 Cal. 611, 105 Pac. 745, 27 L. R. A. (N. S.) 395, and *Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041, are sometimes cited for the proposition that resale price maintenance agreements were valid in California even before the Fair Trade Act. The *Cartwright Act*, however, changed this rule. The *Grogan* case arose before the *Cartwright Act*, while in the *Ghirardelli* case, which came up on the pleadings, facts (not appearing in the case at bar) were averred that brought the case within one of the exceptions contained in the anti-trust law.

equal protection of the laws. [*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 556-64, 46 L. Ed. 679, 688-92, 22 S. Ct. 431, 438-41.]

Classification, of course, is perfectly consistent with the Fourteenth Amendment, but only if it is based upon differences between the selected classes having a direct and rational connection with the subject-matter and purpose of the statute in question. [*Smith v. Cahoon*, 283 U. S. 553, 566-7, 75 L. Ed. 1264, 1274, 51 S. Ct. 582, 587; *Southern Ry. Co. v. Greene*, 216 U. S. 400, 417, 54 L. Ed. 536, 541, 30 S. Ct. 287, 291; *Truax v. Corrigan*, 257 U. S. 312, 337-8, 66 L. Ed. 254, 265, 42 S. Ct. 124, 131; *Atchison etc. Ry. Co. v. Vosburg*, 238 U. S. 56, 59, 59 L. Ed. 1199, 1200, 35 S. Ct. 675, 676; *Frost v. Corporation Commission*, 278 U. S. 515, 522-3, 73 L. Ed. 483, 488-9, 49 S. Ct. 235, 238.] Consequently, it may be permissible, under certain circumstances, to classify as between dealers having a well-known or well advertised trade name and those who do not. [*Borden's Farm Products Co. v. Ten Eyck, supra.*] But the classification challenged here does not meet the requirements of these decisions.

The only difference between the two classes marked out by the Fair Trade Act is that the articles in one class bear the trademark, name or brand of the producer, whereas those in the other class do not. The dividing line is not between well-known articles, or articles whose trademark or brand has acquired a distinctive meaning, on the one hand, and articles not having that attribute,

on the other. Yet, keeping in mind that the purpose of the statute is to protect the producer's interest in the mark or name and the goodwill which he has built up, which necessarily implies an association by the public of the name and the commodity, it seems plain that some such discrimination should have been made.[8]

Almost any sort of commodity may be sold with the producer's name on it or its container. It does not follow from this fact alone that the name or the commodity has acquired such a reputation as to make it adaptable to "leader" merchandising or subject to the injurious effects which are said to result from that form of selling. Articles bearing the producer's name may, so far as the purpose of the Fair Trade Act is concerned, be no different from similar articles sold without the name affixed to them,—at least until something approaching the "secondary meaning" of trademark law has been acquired. Yet it is the mere circumstance of name or brand, without regard to its association in the public mind with the article to which it is appended, that furnishes the boundary between the exempted and non-exempted classes. Such a classification, we submit, is arbitrary.

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8. Something of this sort is hinted at by the title of the statute which refers to "the distribution of articles of standard quality under a *distinguished* trademark, brand or name." [Ante, p. 7. Italics ours.] The suggested distinction was not carried into the substantive provisions of the act.

Conclusion.

The majority opinions of the state Supreme Court, it will be seen on reading, are devoted almost entirely to establishing the proposition that it is within the power of the legislature to declare the state's economic policy and that consequently it is permissible to impose restrictions on free competition when it may be reasonably supposed that the public welfare requires them. This general *dictum,* even if true, cannot sustain the specific statute challenged here. Legislation of the scope and character of that statute is beyond the power of the legislature. A legitimate end cannot be reached by unconstitutional means. For the reasons indicated we believe the Fair Trade Act to be arbitrary and without the limits imposed by the Fourteenth Amendment. We respectfully submit, therefore, that the judgment of the Supreme Court of California should be reversed.

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APPENDIX.

I.

Variations in Average Cost of Doing Business.

The cost of doing business varies greatly with different types of business, with different units in the same business, and in different localities within the same state.

A. Different Kinds of Business.

(1) Fifteenth Census of the United States, *Distribution,* Vol. 1, *Retail Distribution,* Part 1, p. 21.

"Expenses vary greatly with different kinds of business. . . . Expenses also vary considerably in different sections of the country, as shown by comparison of State Averages, and they increase with the size of the city."

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(2) Encyclopedia of the Social Sciences, Vol. 13, pp. 353, 354.

". . . Expenses of operation within the various types of retail establishments vary considerably as a result of difference in the amount of handling required, in amounts of capital invested, in risks involved and in other services. The lowest operating expenses are as a rule to be found in those types rendering the fewest services and handling the goods with the most rapid turnover and with the lowest capital investments. . . . The highest operating expenses are to be found in retail establishments required to render a great deal of service. . . .

". . . . Retail operating expenses in the same type of stores, offering the same services, are generally lower

in smaller towns and higher in large cities. Similarly, operating expenses tend to increase on passing from stores in neighborhood and suburban centers to central locations in the same cities. . . ."

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(3) The following table shows the average expense of operation (expressed in percentages of total sales) for various kinds of business. The averages given are for the United States as a whole, for the state of California, and for the cities of Los Angeles and San Francisco. The data are taken from the FIFTEENTH CENSUS OF THE UNITED STATES, *Distribution,* Vol. 1, *Retail Distribution,* Part 1, pp. 51-3; Part 2, pp. 158-60, 194-6, 212-14. Only a part of the businesses reported in the Census are included in this table.

Business	*U. S.*	*Calif.*	*L. A.*	*S. F.*
Food Group	19.50	19.94	21.65	21.78
Candy-Nut Stores	38.40	45.40	48.17	46.56
Candy and Fountain	32.78	37.74	36.95	41.96
Dairy Product Stores	19.82	28.79	27.79	19.47
Grocery, without meats	17.36	17.31	18.03	17.77.
Grocery, with meats	15.78	15.75	17.81	19.25
Meat Markets	18.96	20.67	23.62	18.97
Meat, with groceries	17.21	18.16	20.47	19.55
General Food Stores	24.16	26.35	26.43	25.11
Bottled Waters and Beverages.	46.10	48.77	52.42	66.92
General Stores	13.59	16.69	.....	14.11
Grocery, with apparel	14.74	17.58	18.36	11.82
Grocery, with dry goods	14.53	16.06	18.36	20.33

Business	*U. S.*	*Calif.*	*L. A.*	*S. F.*
General Merchandise Group	26.81	28.71	29.70	30.14
Department Stores, without food	29.25	31.06	32.19	31.64
Department Stores, with food	28.19	25.86	25.56	.....
Dry Goods Stores	24.21	27.78	28.61	29.27
General Merchandise, with food	16.17	21.63	.....	17.22
General Merchandise, without food	21.66	24.69	41.46	23.96
Automotive Group	22.06	23.06	23.14	23.25
Accessory Stores	28.34	28.85	28.05	30.00
Filling Stations	23.68	27.76	31.15	26.87
Filling Stations, with accessories	22.87	24.25	25.60	27.71
Garages	44.58	52.49	59.75	54.96
Apparel Group	30.64	34.45	35.26	36.62
Men's Clothing Stores	27.28	29.78	27.93	33.27
Men's Hat Stores	36.56	42.33	47.54	37.37
Men's Clothing and Furnishings	28.71	30.86	32.39	31.67
Hosiery	32.31	41.18	37.43	51.13
Men's Shoe Stores	31.04	36.62	34.21	37.42
Women's Shoe Stores	30.05	35.20	33.53	40.20
Family Shoe Stores	29.09	33.04	32.34	34.45
Furniture and Household Group	32.51	36.42	40.23	36.13
Lumber and Building Group	25.99	25.37	23.78	30.10

Business	*U. S.*	*Calif.*	*L. A.*	*S. F.*
Other Retail Stores	27.00	29.34	30.89	36.11
Hardware Stores	26.63	28.74	29.29	34.19
Book Stores	32.46	31.84	33.01	34.70
Cigar Stores, with fountains	31.22	33.84	40.06	29.27
Cigar Stands	42.46	44.41	47.01	59.38
Cigar Stores, without fountains	27.38	31.03	27.17	33.48
Drug Stores	27.21	27.65	23.08	30.69
Drug Stores, with fountains	27.05	27.55	28.53	31.68

(4) Later data collected by the U. S. Census Bureau show the same general variations as are disclosed above. See, U. S. BUREAU OF THE CENSUS, *Census of American Business, Retail Distribution* (1933), Vol. 1, p. A-5, Vol. 2, pp. 60-71.

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(5) The same standard commodity may be sold by many different classes of retailers, each class having a different operation cost.

(a) FEDERAL TRADE COMMISSION, *Report on Resale Price Maintenance,* Part II, p. 136.

". . . Today most products are handled by various types of retailers. Foods, drugs and hardware items are likely to be handled to some extent by drug stores, grocers, department stores, dry-goods stores, specialty stores, and general stores. Other items—for example, electrical

goods and mechanical household equipment—are to be found in the stocks of hardware stores, department stores, furniture and house furnishing stores, and specialty stores, including the merchandising departments of public-utility companies. Then, further, within each general class of merchants there are those pursuing different methods of merchandising. There are the independent merchant or individual store owner and the chain store, the service retailer giving credit and delivery, and the cash-and-carry retailer. . . ."

(b) HARING, *Retail Price Cutting,* pp. 39-41.

"The ordinary manufacturer of trade-marked merchandise does not obtain complete distribution through one type of retailer. Chewing gum is sold through innumerable outlets. Candy bars appear in drug stores, grocery stores, variety stores, and garages. Sandwiches are now handled in drug stores, and 5¢ and 10¢ stores as well as lunchrooms. A hardware store may take on a sideline of ice cream; a drug store may sell nails; super-service filling stations may almost be classed as general stores.

"This situation is very important from the standpoint of resale prices because the costs of doing business vary with each different type of outlet. . . .

* * * * * * * * *

"Costs of doing retail and wholesale business differ between types of outlets (grocery and drug stores), be-

tween types of stores in the same general classification (chain and independent grocery stores), and between individual stores (efficient and inefficient independent grocery stores). . . ."

(c) To the same general effect see: GRETHER, *Resale Price Maintenance in Great Britain, With an Application to the Problem in the United States,* University of California Publications in Economics, Vol. II, at pp. 329-32; and, HILL AND SCOTT, *Competition Between Different Types of Retail Outlets in Selling the Same Commodity,* 11 Harvard Business Review, 519.

B. WITHIN THE SAME KIND OF BUSINESS.

(1) FIFTEENTH CENSUS OF THE UNITED STATES, *Distribution,* Vol. 1, *Retail Distribution,* Part 1, p. 21.

"Group averages, which must be very general at best, as is true of all expense averages shown in the census report, do not show the extreme variation which exists between different kinds of stores, or why some retailers can operate at a ratio as small as 11 per cent. while others require more than 50 per cent.

"The variation depends largely upon factors of value of the unit of sale, extent of conversion or processing, or the addition of service, individual attention required in selling, technical or popular knowledge of the merchandise, cost of delivery, installation and maintenance, degree of specialization of the lines carried, proportion of related commodities sold and efficiency of management. . . ."

(2) The following tables show the high, low and average operating expenses (expressed in percentage of total sales) of different units within the same line of business. The figures are taken from FEDERAL TRADE COMMISSION, *Report on Resale Price Maintenance*, Part II, pp. 85, 87, 89, 91, 92, 94.

(a) *Drug Stores*

Sales	*Stores Reporting*	*High*	*Low*	*Average*
$200,000 and over	8	39.3	15.7	29.9
$100,000 to $200,000	22	56.4	20.4	29.9
$70,000 to $100,000	24	42.9	15.1	29.3
$50,000 to $70,000	31	43.1	9.6	27.5
$40,000 to $50,000	31	41.0	10.0	26.7
$30,000 to $40,000	44	44.9	11.1	24.4
$25,000 to $30,000	34	35.4	8.8	21.7
$20,000 to $25,000	47	37.0	7.1	22.0
$15,000 to $20,000	45	39.8	7.0	22.1
$10,000 to $15,000	22	50.7	7.5	21.3
Under $10,000	11	55.3	6.9	20.7
All groups	319	56.4	6.9	27.3

(b) *Grocery Stores*

Sales	*Stores Reporting*	*High*	*Low*	*Average*
$100,000 and over	20	25.9	5.2	18.9
$50,000 to $100,000	22	24.5	6.5	14.2
$25,000 to $50,000	27	23.3	6.6	13.0
Under $25,000	11	16.9	2.9	10.8
All groups	80	25.9	2.9	17.6

(c) *Stationery Stores*

Sales	*Stores Reporting*	*High*	*Low*	*Average*
$500,000 and over	4	37.0	20.7	28.8
$100,000 to $500,000	18	50.6	20.1	34.8
Under $100,000	10	53.7	21.3	36.8
All groups	32	53.7	20.1	32.3

(d) *Jewelry Stores*

Sales	*Stores Reporting*	*High*	*Low*	*Average*
$100,000 and over	11	47.0	20.4	35.3
$50,000 to $100,000	11	56.3	32.2	42.8
$25,000 to $50,000	7	45.0	22.6	34.2
Under $25,000	9	49.2	6.5	35.4
All groups	38	56.3	6.5	36.5

(e) *Dry Goods Stores*

Sales	*Stores Reporting*	*High*	*Low*	*Average*
$500,000 and over	4	35.0	26.1	30.2
$100,000 to $500,000	13	42.6	22.4	29.2
$50,000 to $100,000	12	39.0	21.6	30.8
Under $50,000	11	47.1	5.5	22.7
All groups	40	47.1	5.5	29.7

(f) *Department Stores*

Sales	*Stores Reporting*	*High*	*Low*	*Average*
$1,000,000 and over	27	35.2	20.0	27.6
$500,000 to $1,000,000	11	35.1	19.8	28.2
Under $500,000	12	32.6	17.6	26.0
All groups	50	35.2	17.6	27.6

(3) A survey of retail drug stores in St. Louis, conducted by the U. S. Department of Commerce in 1931, revealed that in one group of seven independent drug stores total operating expense varied from 26.6% to 38.6% of net sales; and in another group of thirteen, the expense ratios ranged from 26.2% to 43.1% of net sales. [U. S. DEP'T OF COMMERCE, *Costs, Sales and Profits in the Retail Drug Store,* Domestic Commerce Series No. 90, pp. 23, 110.]

A survey of Louisville grocery stores, made by the same department, showed expense ratios from 12.7% to 48.7%. [U. S. DEP'T OF COMMERCE, *Merchandise Characteristics of Grocery Store Commodities;* Distribution Cost Study, No. 13, p. 23.]

An extensive and recent investigation into the subject of retail operating costs and profits has been made by Dun & Bradstreet, Inc. Illustrative figures from this survey are: In 1934 the operating expenses of 129 cigar and cigarette dealers ranged from 8.45% to 35%; for 1078 drug stores the range was from 25.20% to 42.04%, and

for 104 bookdealers the variation was from 21.5% to 42%. [DUN & BRADSTREET, *Retail Survey,* 1934.]

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(4) MURCHISON, *Resale Price Maintenance,* Columbia Univ., Studies in History, Economics and Public Law, Vol. 82, No. 2, pp. 54, 56.

". . . These reports [of the Harvard School of Business Administration] indicate that retail grocers do business at an average cost of 16.5% of net sales, and that their net profits vary from 2½% to 5½%. The standard of deviation for the cost figures was rather high, the figures ranging from 10.4% to 25.2%. The average gross profit, that is, the difference between net sales and the cost of their stock, was found to be 21%. The variation is from 14.6% to 28%.

* * * * * * * * *

". . . as between retailers of any given type of goods, there are to be found the same variations in the cost of doing business as are found among grocers. . . ."

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(5) CONVERSE, *Elements of Marketing* (1935), p. 881:

"Different stores have different operating expenses. Stores in small towns have lower expenses than stores in large towns. Efficient stores have lower expenses than inefficient stores. . . ."

II.

Variations in Selling Price of Same Commodity.

The same commodity is frequently sold, within the same city or locality, at different prices for reasons having no necessary connection with "predatory" price cutting.

A. Variations in Price.

(1) The following table shows the results of a survey of the selling prices of 47 standard commodities, made in New York City in connection with the Seligman and Love investigation. The data have been compiled from Seligman and Love, *Price Cutting and Price Maintenance,* Appendix One, pp. 361-2. The table shows the number of stores reported, and the number selling each commodity in each price group. The price groups are classified in terms of percentage of the list price.

Product	*Total Stores*	45%-55%	55%-65%	65%-75%	75%-85%	85%-95%	95%-100%
Food Drink	160	2	12	56	33	32	25
Shaving Cream 1	116	0	0	0	2	30	84
Shaving Cream 2	181	8	12	41	42	17	61
Shaving Cream 3	190	0	4	30	20	54	82
Antiseptic 1	189	0	7	12	146	2	22
Antiseptic 2	184	0	1	13	75	69	26
Antiseptic 3	188	0	0	7	57	59	65
Baby Powder	169	2	38	5	40	14	70
Dental Cream 1	196	15	124	32	12	0	13
Dental Cream 2	193	0	49	41	76	0	27
Dental Cream 3	193	0	45	56	66	13	13
Dental Cream 4	186	0	18	61	19	32	66

Product	*Total Stores*	45%-55%	55%-65%	65%-75%	75%-85%	85%-95%	95%-100%
Sanitary Napkin	186	0	41	15	44	68	18
Tooth Brush 1	178	4	14	22	68	43	27
Tooth Brush 2	181	4	10	26	65	44	32
Skin Lotion 1	156	0	0	0	35	69	52
Skin Lotion 2	189	2	9	73	38	42	25
Skin Lotion 3	190	0	9	23	87	50	21
Headache Remedy	185	0	34	50	83	5	13
Face Powder	189	0	6	51	48	66	18
Face Cream 1	127	0	1	1	18	38	69
Face Cream 2	158	8	29	36	66	3	16
Disinfectant	144	0	0	4	34	73	33
Ointment 1	193	0	9	95	61	15	13
Ointment 2	180	0	0	2	25	89	64
Ointment 3	191	0	62	88	3	22	16
Ointment 4	189	0	2	108	22	37	20
Laxative 1	181	0	29	44	74	13	21
Laxative 2	160	0	10	19	79	24	28
Laxative 3	188	0	0	3	36	40	109
Laxative 4	178	1	106	46	1	8	16
Blood Tonic	110	0	0	3	29	37	41
Cold Remedy 1	189	1	17	13	147	0	11
Cold Remedy 2	190	2	12	9	149	0	18
Cough Remedy	192	0	6	38	92	37	19
Liver Pills	184	0	12	24	81	21	46
Eye Wash	143	0	2	14	75	45	7
Cod-Liver Oil 1	176	0	7	91	51	10	17
Cod-Liver Oil 2	175	0	8	41	61	45	20
Mineral Oil 1	189	2	48	50	46	26	17
Mineral Oil 2	192	2	32	83	46	5	14
Mineral Oil 3	192	0	37	62	68	11	14
Milk Sugar 1	176	0	4	95	39	20	18
Milk Sugar 2	167	29	34	74	15	4	11
Milk of Magnesia	195	0	43	45	67	26	14
Shampoo	181	8	114	31	16	3	9
Liniment	189	0	1	116	24	27	21

(2) COVER, *Retail Price Behavior,* University of Chicago School of Business, Studies in Business Administration (1935), Vol. V, No. 2, pp. 3, 15:

"Prices vary by kind of store, type of operation, service rendered, degree of competition between chain and independent stores, and location with respect to central shopping areas. . . .

* * * * * * * * * *

"It is common knowledge that prices vary for the same commodity both between regions and within a city. A given brand of cigar will vary in Washington from 15 to 20 cents, while a box of the same cigars vary from $3.75 to $4.00. . . ."

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(3) NATIONAL INDUSTRIAL CONFERENCE BOARD, INC., *The Cost of Living in the United States,* 1914-1930, p. 29:

"Retail prices at any given time vary widely. For what purports to be the same article there are differences in prices arising from differences in grade, brand, or quality, while absolutely identical articles may vary according to the type of store in which they are sold or the locations of those stores. . . ."

B. CAUSES OF VARIATION.

(1) MURCHISON, *Resale Price Maintenance,* Columbia Univ., Studies in History, Economics and Public Law, Vol. 82, No. 2, pp. 21-2, 102.

"The selling methods of retailers vary greatly. Some afford their customers elaborate accommodations, parlors,

lounging rooms, finely-appointed sales rooms, music recitals, luncheons, fashion displays, etc. Their practice varies as to credit accommodations and the privilege of returning goods. Some stores deliver the goods to the homes of the customers, and even transport the customers themselves; others, of course, do neither. Some engage in extensive advertising, the giving of premiums, coupons, trading stamps; some make a habit of cutting standard prices. Some cater exclusively to the wealthy, some to the middle classes, some to the poor. . . . Apart from the selling function, the only universal characteristic to be found among retailers is that all of them handle large proportions of branded or trade-marked goods, and hence would in nearly all cases be affected in some way by a price-maintenance policy. Retailers vary not only as to characteristics and general selling methods, but also in their buying. Not all buy largely from jobbers. Some buy in large quantities, some in small, some pay cash, others always depend on credit; some believe in a variety of goods, others stock up only in staples. Some utilize co-operative associations for their buying, some prefer to buy independently.

"These considerations taken in connection with many other varying business methods lead one to the conclusion that, as regards retailers, types are very numerous. Therefore costs and profits among retailers must be widely variant. . . .

* * * * * * * * *

". . . Throughout the country are thousands of dealers who, by means of legitimate economies, obtained by the exercise of superior business skill, superior organization, superior location, etc., are able to sell goods, both branded

and unbranded, without discrimination at prices lower than the usual. They do not exploit these goods. They sell them at a fair profit. . . ."

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(2) STEVENS, *Resale Price Maintenance as Unfair Competition,* 19 Columbia Law Review, 265, 268-9.

". . . The demands of the buying public vary widely not only with the purchasing power of the various individuals making up or comprising the group or community, but also with other economic conditions, as well as social factors which affect both the individual and the group. As a result one person prefers a somewhat lower quality of goods than another, provided he can obtain thereby a somewhat lower price. Another prefers good style to good quality. Some buyers pay cash either customarily or from force of necessity. Others demand and insist upon credit. One purchaser desires premiums which do not interest others, while many demand deliveries . . . of purchases which other buyers are content to carry home, etc. As a result of these and numerous other wide divergencies in the demands of the consuming public, different types of sellers and differences in methods of selling develop in an effort to supply human wants more adequately and satisfactorily. Consequently, there arise large stores and small stores; cash stores and credit stores; stores with delivery service, stores without; stores giving premiums and stores which do not; stores carrying high-grade merchandise and stores carrying low; stores in central high-rent locations and stores in neighborhood and low-rent sections. . . All of these factors bring about differences in costs of selling, while numerous other elements, such as volume of business, rate

of turnover, etc., also vitally affect the cost factor. Thus great divergencies in costs appear not only as between sellers of different lines and between different methods of selling, but also as between the sellers of the same lines utilizing identical or similar selling methods."

(3) SELIGMAN AND LOVE, *Price Cutting and Price Maintenance,* pp. 114-5.

". . . The same commodity may be sold at different prices in shops situated in different sections. The price of a given article in a shop located in a fashionable district will, of course, differ from that of precisely the same article sold in a shop in a more moderate neighborhood. The lower price in the latter shop is, therefore, only an ostensible example of a variation from uniform prices. Although we are dealing with the same commodity, we are not dealing with the same market. . . .

". . . A commodity is naturally sold under certain conditions; the price depends on the conditions of the transfer. If the conditions vary, the commodity, although physically the same, will be economically different. When one shop makes a practice of delivering its commodities free of charge, and grants to its customers the privilege of returning the goods if deemed unsatisfactory, while another shop insists on cash payment and restricts or refuses the privilege of exchanging or returning goods, it can scarcely be said that we are dealing with the same thing. If the conditions affecting the sale of physically identical commodities differ, then the commodities are, economically speaking, not the same. The discrepancies in the price are, therefore, ostensible rather than real. The purchaser gets less in the one case than the other, but he gets what he pays for: he pays less,

but gets less, and the seller in the cash and non-return store is able to quote a lower price because his cost is lower. Although he is selling the physically identical article at a lower price, he is really selling an economically different article at a lower price."

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(4) CONVERSE, *Elements of Marketing*, p. 882:

". . . Some stores give credit and delivery services with liberal return privileges; some are on a cash-carry and others on a cash-carry self-service basis. Operating expenses vary with the services performed, and we do not expect all these stores to sell at the same price. Many people prefer the economy stores. If they prefer to pay cash and to carry their goods home, it would seem that they should have this privilege and be allowed some compensation for performing the service for themselves."

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(5) NATIONAL INDUSTRIAL CONFERENCE BOARD, INC., *Public Regulation of Competitive Practices*, p. 94:

"But there are other elements in the final price to the consumer besides the return realized by the manufacturer. In the absence of resale price maintenance, these other elements representing the wholesalers' and retailers' margins will vary according to the costs of distribution under different systems and even according to the relative efficiency of different dealers operating within any particular system. . . . The final price will tend, in every instance, to reflect: (a) the relative distance of the consumer from the point of origin of the goods; (b) the extent and nature of the supplementary services furnished

by the merchant, *e. g.*, credit, delivery, repairs, shopping conveniences, etc.; and (c) the individual efficiency of the merchant in respect to the basic factors of mercantile management: stock-turnover, clerical expense, rent, and the like. . . ."

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(6) In California, according to the FIFTEENTH CENSUS OF THE UNITED STATES, *Distribution,* Vol. 1, *Retail Distribution,* Part 2, p. 172, 47.01% of all retail stores do an all-cash business; 32.16% do half or less of their business on credit, and 20.83% do more than half of their business in that way. In 11.87% of all stores, 70% or more of their total business is credit. The 1933 survey shows that of 89,554 retail stores reporting, 43%, doing 62% of the total business of the state, did a credit business. The credit sales reported by these stores represented 47% of their total sales. [U. S. BUREAU OF THE CENSUS, *Census of American Business, Retail Distribution* (1933), Vol. 1, p. A-20.]

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(7) FEDERAL TRADE COMMISSION, *Chain Stores, Final Report,* 74th Congress, 1st Sess., Sen. Doc. No. 4, p. 74.

". . . The advantages which inhere in a cash business with no credit losses and in savings on clerk hire and delivery expense are bound to be reflected in the lower cost of doing business which the inquiry shows characterizes chain-store operation."

FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 55

THE PEP BOYS, MANNY, MOE & JACK OF CALIFORNIA,

Appellants,

vs.

PYROIL SALES COMPANY, INC.,

Appellees.

APPELLEE'S BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 55.

THE PEP BOYS, MANNY, MOE & JACK OF CALIFORNIA,

Appellants,

vs.

PYROIL SALES COMPANY, INC.,

Appellees.

APPELLEE'S BRIEF.

The official report of the opinion of the Supreme Court of California is in 5 Cal. (2) 784, 55 Pac. (2d) 194. (Statement as to Jurisdiction, 13, 14.) The court based its decision in this case upon the authority of *Max Factor & Co., etc.* v. *Kunsman,* 5 Cal. (2) 446, 55 Pac. (2d) 177, (See the Transcript of Record in Case No. 79 October term 1936 at p. 24, *et seq.*) which was consolidated below with the case at bar.

The judgment to be reviewed was entered on February 28, 1936 (R. 9, 10) and modified on March 26, 1936. (R. 10.)

The jurisdiction of this court is invoked by appellant because it asserts that the Supreme Court of California erred in holding that Section 1½ of the state "Fair Trade

Act'"[1] was not repugnant to the Fourteenth Amendment of the Constitution of the United States.[2]

I.

THE STATUTE IN ISSUE.

The Fair Trade Act of the State of California, as originally passed in 1931, reads:

> An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name.
>
> *The People of the State of California do enact as follows:*
>
> SECTION 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California by reason of any of the following provisions which may be contained in such contract:
>
> 1. That the buyer will not resell such commodity except at the price stipulated by the vendor.
>
> 2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.
>
> Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

---

[1] (Cal. Stats. 1933, ch. 260, p. 793; Deering's Codes, Laws and Constitutional Amendments of California, 1933 Supplement, Act. 8782, p. 2396.)

[2] Section 1½ was added in 1933, to the Act as passed in 1931 (Cal. Stats. 1931, ch. 278, p. 583; Deering's Gen. Laws, Act. 8782, p. 4910).

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

SEC. 2. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

SEC. 3. The following terms, as used in this act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

SEC. 4. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

SEC. 5. This Act may be known and cited as the "Fair trade act."

Approved May 8, 1931
Effective August 14, 1931

Section 1½, passed in 1933, reads:

An Act to add a new section to the "Fair Trade Act" to be number 1½, relating to unfair competition.

The People of the State of California do enact as follows:

SECTION 1. A new section is hereby added to the "Fair Trade Act" to be numbered 1½ and to read as follows:

SEC. 1½. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Approved, May 8, 1933
Effective, August 21, 1933.

II.

STATEMENT OF THE CASE.

Appellee instituted this suit in the Superior Court of the State of California in Los Angeles County on April 26, 1934. (R. 1.) Its complaint, the truth of the allegations of which stand admitted by appellant's demurrer (R. 7), shows:[3]

> Appellee (hereinafter in this summary referred to as plaintiff) is a California corporation with its principal place of business in the County of Los Angeles. (R. 1.) It is the exclusive distributor, in a designated California territory, of Pyroil. (R. 1.) The warehousing, distribution and marketing of Pyroil is the sole and only business of plaintiff. (R. 5.) Pyroil is a patented lubricant composed only of the finest lubricating elements. (R. 2.)
>
> It is identified by distinctive trade-marks, names, labels and copyrights. (R. 1.) Appellee has the exclusive right to the use, in said territory, of said trademarks, names, labels and copyrights. (R. 1, 2.) Pyroil for several years has been advertised, in national publications, such as The Saturday Evening Post, Time, Maclean's (Canada), over the radio, at automobile races, in dryrun tests and by many others means. (R. 2.) Pyroil enjoys, and for several years has enjoyed, a good reputation among dealers, retailers and consumers. (R. 2.)
>
> The Pyroil Company of La Crosse, Wisconsin, the

[3] Appellant's summary of the material allegations of the complaint does not state: that plaintiff has the exclusive right to the use, in a designated territory, of the trade-marks, names, labels and copyrights identifying Pyroil (R. 1, 2); that the warehousing, distribution and marketing of Pyroil is the sole and only business of plaintiff (R. 5); that plaintiff refuses to sell its products to dealers and retailers who do not execute the contracts (R. 4); and that defendant obtained the product against plaintiff's will. (R. 4.)

manufacturer, ships its Pyroil products from its factories to California where it warehouses said products and shipments in bonded warehouses, and plaintiff obtains Pyroil from such bonded warehouses, in turn warehousing the same at plaintiff's local points of distribution and marketing. (R. 2.)

There has developed in the automobile accessory trade in California a practice of cutting the price of well-established and advertised commodities, well known to the public, and identified by distinctive trade-marks, names, labels and copyrights; such products and such cut prices were and are used as so-called "leaders" or "loss leaders" to attract people and prospective purchasers into automobile accessory establishments (R. 2), depending upon those so attracted to make purchases of other goods and similar articles which yield sufficiently large profits to make up for losses involved in such cut prices. (R. 3.)

Plaintiff, to protect itself and the public against such injurious and uneconomic practices, recognized by the Fair Trade Act, adopted a system of doing business which consisted of entering into contracts with dealers in its territory, obligating the latter to sell Pyroil only to consumers at specified prices. (R. 3.)

These prices are fair and reasonable and practically all dealers and retailers in plaintiff's territory have executed such contracts with plaintiff (R. 3.) Plaintiff refuses to sell its products to dealers and retailers who do not execute such contracts. (R. 4.)

As a result of such contracts and method of merchandising: plaintiff enjoys a reasonable profit in the sale of its products, immunity from injurious price-cutting and unobstructed distribution; the public has benefited through reasonable prices and high quality enabled by consequent volume production, and dealers obtain a reasonable compensation for their services. (R. 3.)

The defendant operates six retail stores in the cities of Los Angeles, Glendale, Huntington Park and Long Beach, County of Los Angeles, State of California. (R. 4.) Defendant, with the purpose of interfering with, and disrupting, plaintiff's said contracts and business, has knowingly and willfully advertised, offered for sale and sold said Pyroil products at less than the prices stipulated in said contracts. (R. 4.)

In so doing, the defendant knew of the said contracts, and, previously to such advertising, offering for sale and selling by defendant, it has always had an opportunity to purchase said products on the same terms and conditions as other retailers and dealers, but had not done so, and obtained said products in ways unknown to plaintiff and against plaintiff's will. (R. 4.)

Specifically, defendant has so advertised, offered for sale and sold Pyroil in the original sealed lithographed and trade-marked containers at the cut prices of 49c and 69c on the pint size, the established price being $1.00, and at 89c and $1.19 on the quart size, the established price being $1.75. (R. 4, 5.) Defendant's cut price sales have continued and are continuing at the time of the filing of this complaint. (R. 5.)

The said willful acts of the defendant: have induced, coerced and forced other dealers and retailers who have executed contracts with plaintiff to cancel, and threaten to cancel, the same and to refuse to accept further deliveries of Pyroil from plaintiff; have induced the public to believe that Pyroil products are not worth the price at which they are nationally advertised and fixed by the manufacturer; made it impossible for other dealers to market the same at the fixed and advertised prices; and caused said dealers to threaten to discontinue the sale of Pyroil. (R. 5.) Each and all of the acts complained of are continuous and continuing in their nature. (R. 6.)

Defendant's continuance of the marketing of Pyroil

at such cut prices will produce great and irreparable injury to plaintiff; the wrongs complained of imminently peril and immediately threaten devastation of plaintiff's business, destruction of its good will, and multiple breaches, violations and cancellations of its said contracts. (R. 5.)

It would be extremely difficult to ascertain the amount of compensation which would afford adequate relief to plaintiff for loss of sales, destruction of its business and the good will pertaining thereto; pecuniary compensation would not afford adequate relief to plaintiff; restraint is necessary to prevent a multiplicity of judicial proceedings; plaintiff has suffered and will suffer great and irreparable injury for which there is no adequate remedy at law. (R. 5, 6.)

Plaintiff prays for an injunction restraining the defendant from selling Pyroil products in the designated California territory except in the original lithographed and sealed containers, bearing the trade-mark, label, name and copyright of the manufacturer and at prices established by the plaintiff and fixed by the manufacturer. (R. 6.)

On May 2, 1934, defendant demurred to the complaint on the ground that the Fair Trade Act is void and unconstitutional as being contrary to Section 1 of Article Fourteen of the Amendments to the Constitution of the United States and of certain provisions of the Constitution of the State of California. (R. 7.)

On July 13, 1934, the trial court entered judgment for defendant, dismissing plaintiff's complaint. (R. 8.) This judgment was based upon the trial court's sustaining of defendant's demurrer without leave to amend.

On March 26, 1936, the Supreme Court of California reversed the trial court and ordered it to enter judgment for the plaintiff as prayed. (R. 10.)

III.

QUESTION PRESENTED.

The sole question presented by this appeal is whether or not, in its enactment of Section 1½ of the Fair Trade Act, the legislature of the State of California exceeded the limitations of any provision of Article XIV of the Amendments to the Constitution of the United States.[4] Concretely the question is, can a state create a civil cause of action and confer upon its courts jurisdiction to entertain it?

IV.

SUMMARY OF ARGUMENT.

Business experience which may be judicially noticed by this court, and the admitted facts of this case (R. 2, 3, 5), demonstrate that property rights in good-will symbolized by trade-marks, brands and names, may be misappropriated and seriously injured, by persons who do not own them, through "leader" or cut-price sales featuring such marks. As early as 1909, the common law of California and, in 1931, the state legislature, recognizing this truth, sanctioned contracts stipulating resale prices on such commodities.

The implications of the common law and the express provisions of the Fair Trade Act, as passed in 1931, are that these contracts are valid and enforceable provided: (1) Such commodities are identified by trade-marks, brands or names; (2) are in fair and open competition with others of the same general class; and (3) that such contracts are not made between competitors (*i. e.*, horizontally).

Business experience, and the admitted facts of this case,

[4] Appellant's statement of the question presented (Appellant's Brief, p. 9) assumes that the statute empowers "private persons in their absolute and uncontrolled discretion to fix the selling price of all ordinary commodities owned and offered for sale by another in the ordinary course of retail business merely because the commodities bear the producer's trade mark, name or brand." Determination of the constitutional question will, in part, require examination to see if that assumption, and its broad implications, are correct.

further demonstrate that a manufacturer's or distributor's use of such contracts, coupled with the exercise of every legal right to confine distribution to signers, are inadequate to prevent the misappropriation of, and damage to, good-will resulting from price cutting on branded commodities covered by such contracts. The damage and misappropriation result in this manner:

> The non-contracting price cutter, despite all lawful efforts to prevent it, contrives to obtain supplies of the commodity. Free of the restraint of any contract, he advertises and sells at less than the prices established thereby. This conduct, known in the trade as "leader" or "bait" selling, attracts patronage to the cutter's store by creating the false impression that since he undersells this particular commodity, identified by a trade name and a standard price, he sells other commodities at similar low prices.
>
> In addition to this subtle fraud upon consumers, his cut price sales induce breaches of the lawful contracts, incite retaliatory (and a vicious circle of) cutting, and cheapen the product in the public mind. The ultimate result is to prevent his competitors from earning a reasonable profit in the sale of the commodity and the consequent impairment of the manufacturer's or distributor's ability to find a market for the product. These consequences all flow from a single and fundamental cause—the price cutter has used and traded upon a name he does not own and has done so against the owner's will.

Section 1½ of the California Fair Trade Act, the constitutionality of which is the sole issue before the court, declares "wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price" stipulated in such contracts, whether by a party or not, to be "unfair competition * * * actionable at the suit of any person damaged thereby."

The essence of the statute, therefore, is that it defines a species of unfair competition and permits access to the

civil courts of the state for redress or prevention. The statute deals with questions which are intrinsically economic, not legal, and which are the proper subject of the state's law making power. Further, Section 1½ is a valid declaration of the public policy of the State of California to afford additional protection to property rights, created by it, in trade-marks, brands and names. And, as a statutory development of the law of unfair competition, Section 1½ frees California commerce from abuses in the sale of goods identified by trade-marks, brands and names.

Section 1½ is neither a legislative attempt to fix prices, nor a delegation of the right to do so. Nothing in it prevents a merchant from selling any product at any price he chooses in closing out stock or if he detaches, removes or obliterates the trade-mark, brand or name with which alone the statute is concerned and which is not the dealer's property but is the producer's. The statute, therefore, does no more than permit the owner of property effectively to impose restrictions upon uses of it by strangers, which damage or destroy it.

The validity of the statute is indicated by expressions of this court and by sound analogy to common law principles, such as the tort of inducing breach of contract obligations and equitable servitudes upon real property. The application of these common law principles often has the same restrictive effects upon liberty of person and property as those features of the statute which form the chief basis of appellant's contention that it is unconstitutional.

Tested in the light of the facts before the court and by well-settled rules of constitutional construction, Section 1½ of the California Fair Trade Act violates no provision of the Constitution of the United States.[5]

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[5] Appellee concurs fully with, and respectfully refers the court to, the brief of appellees in *Kunsman* v. *Max Factor & Co.*, No. 79 October term, 1936, for a more extensive and somewhat different presentation of the constitutional question.

V.

ARGUMENT.

I. SECTION 1½ OF THE CALIFORNIA FAIR TRADE ACT IS AN APPROPRIATE EXERCISE OF LEGISLATIVE POWER IN FURTHERANCE OF A PROPER LEGISLATIVE PURPOSE.

A. The statute affords an effective means of accomplishing the economic objective to which it relates.

The facts before the court in this case are a particularization of common experience in the distribution of commodities identified by a trade-mark, brand or name.[6] The common experience is this:

> A manufacturer produces a product to be marketed in a competitive field. He gives that product a trade-mark or a distinctive name. Such mark of identification, his property, becomes the symbol by which his product is distinguished from his competitors'.
>
> By a course of dealing over a period of years, including extensive advertising, his product achieves a public acceptance and demand. His trade-mark or brand has become inseparably associated with that acceptance and demand. It has become valuable to him as the symbol of his good will. It has become valuable to middlemen because it has given them a ready market. The mark of identification has become valuable to the public as a convenient means of designating the product, its source and its substance, enabling purchasers to exercise a freedom of choice which is the essence of fair competition.
>
> To promote distribution of the product, standard resale prices have been advertised and established by

[6] See the appendix to appellees' brief in *Kunsman* v. *Max Factor & Co.*

lawful contracts with dealers who sell it. These prices are fair and reasonable. Virtually all dealers enter into such contracts. All constantly have a fair and equal opportunity to purchase the product upon like terms. Dealers who do not desire to sign contracts are refused supplies of the product, so far as the producer and the distributors have it in their power.

This system of distribution has profited the producer by resulting in extensive sales. It has brought him the valuable support of retail distributors who have been thus assured of a reasonable profit for their services. The consuming public has been protected against exploitation, not only by the admitted reasonableness of the prices, but also because of its freedom and opportunity to choose competing products.

Despite every legal effort to confine retail distribution to dealers who agree to maintain prices, a few dealers successfully contrive to obtain the product. They then proceed to advertise and sell it at cut prices. Their purpose is to attract customers by creating the false impression that, because they sell this particular product at a price substantially less than that for which it may be obtained elsewhere, they sell all other products at correspondingly low prices. As a matter of fact, such dealers depend upon the very customers so attracted to make purchases of other goods which yield sufficiently large profits to recoup for the sales of the particular product at cut prices.

The results of this practice of the few dealers are, so far as a particular product is concerned, far reaching and disastrous. The great majority of dealers lose incentive to sell it. If they maintain the established price, they do not get the business. If they meet the cut price, their sales bring no reasonable return and invite deeper cutting in reprisal. The consuming public has been misled and the product cheapened in its eyes. The good will connected with the product is

seriously impaired, if not destroyed. Dealers who have signed the price maintenance contracts break or cancel them. All dealers have lost the valuable asset of profitable sales of the product in any volume comparable to that which existed before the price-cutting by the few.

A few dealers have thus, by deliberate appropriation of a name which does not belong to them, damaged all persons who have a legitimate property or trade right in it.

Section 1½ of the California Fair Trade Act does no more than permit access to the civil courts of California for relief against such misappropriation of trade names and such interference with contract rights. Since, both as a practical and legal matter, it is impossible for a producer, try as he may, to keep the products bearing his name out of the hands of dealers who refuse or fail to sign his contracts, Section 1½ provides the sole means of protecting his contract system and his good will against "bait" advertising and selling.

B. Price maintenance contracts of the character before the court in this case are valid under both the statutory and common law of the State of California.

The California Fair Trade Act, as passed in 1931, is, in all substantial particulars simply a statutory duplication of the common law of the state. As early as 1909, the Supreme Court of California approved a contract requiring a retailer to sell olive oil, identified by the producer's name and copyrighted designs on the containers, at prices stipulated by the producer.

Grogan v. *Chaffee,* 156 Cal. 611, 105 Pac. 745.

In 1912, the California Supreme Court held that the manufacturer of Ghirardelli's Ground Chocolate had a

right of action, as a third party beneficiary, against a retailer who sold the trade-marked product in violation of the retailer's contract with his wholesaler to maintain the prices specified by the manufacturer.[7]

D. Ghirardelli Co. v. *Hunsicker,* 164 Cal. 355, 128 Pac. 1041.

The California Supreme Court has described the Fair Trade Act's authorization of price maintenance contracts as merely embodying "* * * a rule of law well settled in this state." (Statement As to Jurisdiction, pages 30, 31.)

C. Section 1½ of the California Fair Trade Act is not a legislative attempt to fix prices; it is a declaration of the State's policy to afford adequate protection to property rights in trade-marks, brands and names and a statutory development of the law of unfair competition.

1. Section 1½ is merely a specification of acts constituting unfair competition; it describes a willful tort, and makes it actionable in a civil proceeding.

It is important to note these features of the California Fair Trade Act:

a. Its terms do not embrace bulk commodities. It is limited to products which bear the trade-mark, brand or name of the producer or owner.

b. It is limited to products sold in free and open competition with other products of the same general class.

c. Contracts between producers, and between distributors, are not allowed. The agreements to maintain prices must be "vertical," not "horizontal"; that is, they may be between the producer and the wholesaler or retailer, or between the wholesaler and

[7] Compare Section 1, sub-section (2) of the California Fair Trade Act.

the retailer, but they may not be between producers, nor wholesalers, nor retailers.

d. If a dealer no longer wishes to trade upon the name of a commodity distributed under the Act, he may sell it at any price he chooses. Section 2, subsection 1, gives this right "* * * in closing out the owner's stock for the purpose of discontinuing delivery of any such product."

e. It prohibits nothing; it commands nothing; it is purely permissive. Section 1 of the Act allows a producer or distributor if he chooses to do so, to enter into contracts with distributors of goods bearing his trade-mark, brand or name, establishing resale prices, to protect his distribution and good will, and to bring to his distributors and the consuming public the benefits which flow from stabilized prices. Section 1½ protects such a system of distribution from destruction at the hands of persons who refuse to sign such contracts but who nevertheless trade upon the trade-mark, brand or name. Section 1½ applies only when such persons act "willfully and knowingly." (It is generally, and is shown by the record in this case to have been, impossible to keep the goods out of the hands of "cut-rate" dealers.)

f. It provides no penalties. It merely allows a civil proceeding for redress to be brought by any person who is damaged by the acts which are described as unfair competition. The nature of such redress is not specified, and presumably it would consist of such remedy as a court of law or equity would deem just under the particular circumstances of the case.

Naturally the California Fair Trade Act applies only to the State of California, since state statutes have no extra-territorial force,[8] and the state, in providing for a civil

[8] *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347. at 357.

suit, must be presumed to have intended to confer jurisdiction upon its own courts.[9]

Since the statute refers only to a commodity "which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity," it would obviously be inapplicable where the trade-mark brand or name is removed, detached, or otherwise dispensed with in the advertising and sale of any product.

In the light of these considerations, Section 1½ may well be paraphrased as follows:

> "Where a person deals in a product which bears the trade-mark, brand, or name of another, and utilizes such trade-mark, brand, or name in advertising or selling the product, and willfully and knowingly, to the damage of others, advertises or sells the product at a price less than that which he knows has been established in lawful contracts, he thereby competes unfairly; and any person who has suffered injury as a result thereof may sue him in the courts of California to obtain such redress, legal or equitable, as the courts may deem just under the particular circumstances of the case."

In other words, Section 1½ is merely a specification of acts constituting unfair competition. It describes a willful tort, and makes it actionable in a civil proceeding at the instance of a person who can show legal injury caused

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[9] This court said in *Arizona Copper Co.* v. *Hammer*, 250 U. S. 400, 426, in upholding the employers liability law of Arizona:

> "And it amounts to a contradiction of terms to say that in submitting a controversy between litigants to the established courts, there to be tried according to long-established modes and with a constitutional jury to determine the issues of fact and assess compensatory damages, there is a denial of 'due process of law'."

thereby. It does no more than open the courts of California for redress against acts which it is the public policy of the State of California to regard as unfair competition.

2. Section 1½ of the California Fair Trade Act is not a legislative attempt to fix prices.

This section of the Act is concerned with price only incidentally. It neither fixes prices nor requires that prices be fixed. It is purely permissive. Its purpose is to protect lawful contracts from being frustrated, and to safeguard property rights which emanate from trade-marks, brands and names.

To be sure, where resort is had to the permissive features of the Act, price is affected, but only as an incident to the broader purpose of protecting trade-marks, brands and names, and lawful contracts. The California Supreme Court observed in this regard (Transcript in No. 79, pp. 36-38):

> "As already pointed out, this statute does not aim primarily at regulating prices, but at protecting the property and contract rights of the manufacturer, producer, distributor and retailer.
>
> • • • • •
>
> The statute, as its title indicates, by preventing price-cutting, is aimed at protecting these valuable property and contract rights of the manufacturer or producer—rights just as valuable and just as much entitled to protection as the right of the retailer, who is attempting, by exercising his claimed right of freedom of action, to injure the property and contract rights of the manufacturer or producer. The statute, in other words, does not merely prohibit price-cutting in order to regulate prices, but prohibits price-cutting in an attempt to protect the validly acquired rights of others. • • •"

It is significant that there is nothing in the California Fair Trade Act which prevents a merchant from selling a product at any price he chooses, providing he detaches, removes, or otherwise dispenses with the trade-mark, brand, or name of the producer. In so far as the product is a merely physical thing, to which the merchant has acquired title, his liberty remains untouched by Section 1½. Thus it clearly appears that the statute is not primarily concerned with regulation of prices. The legislature has merely declared that competition which is carried on by selling trade-marked or branded products at less than the prices which the merchant knows have been established in lawful price-maintenance contracts, is unfair competition.

When we recall, as this court has repeatedly held, that trade-mark property owes its very existence to state law, that the states alone can define and protect trade-marks within their borders, and the substantive law of trade-marks is wholly a state matter,[10] it does not seem logical to assert that the State of California cannot provide for relief against injurious practices relating to trade-marked goods. Moreover, when we consider the importance of the trade-mark or brand to the salability of the product, and that the merchant is trading upon something that he did not create, and that by his action he is doing something which injures and discredits the trade-mark or brand, to the detriment of the owner of it, other merchants and the consuming public, the reasonableness of this legislation becomes apparent.

The court is not called upon to determine the conditions under which price-limitations may be placed upon the alienation of property, *as tangible property.* The question

[10] *American Steel Foundries Co.* v. *Robertson,* 269 U. S. 372, 381; *U. S. Printing & Lithographing Co.* v. *Griggs,* 279 U. S. 156, 158; *American Trading Co.* v. *Heacock,* 285 U. S. 247, 256, 258.

does not deal with the conditions which may circumscribe the sale of property, but merely with the conditions which may be attached to the use of the trade-mark, brand or name under which the property may be sold.

Appellant's insistence that the measure is a price-fixing statute and that it goes beyond the evils aimed at are all grounded in the error of assuming that the statute relates to commodities rather than to trade-marks, brands and names.

In its brief and in the appendix thereto, appellant makes much of the fact that costs of conducting businesses vary. The California legislature was undoubtedly aware of that. But it must be presumed to have determined that impelling reasons for this legislation weighed more heavily and justified limitations upon the use of trade-marks, brands and names. To repeat, the statute does not prevent the sale of any commodity at any price the owner chooses. It simply prevents use of trade-marks, brands or names under circumstances deemed by the legislature to constitute unfair competition. If the owner of the chattel to be sold avoids (by obliteration or otherwise) the use of such marks of identification, the statute in no way interferes with his selling at prices of his own choosing.

Appellant frequently refers to Seligman and Love: Price Cutting and Price Maintenance (Harper & Brothers, 1932), but appellant does not refer to the conclusion reached by the authors as follows:

> "We are accordingly led to the conclusion that the evil with which price maintenance seeks to cope, namely, the evil of certain forms of cut prices, has no justification in either economics or ethics. Price maintenance as a general social policy is to be judged not by the seeming antagonism between consumers as a class and producers as a class, nor, on the other hand, by the ostensible conflict between the two sections of the pro-

ducing class, the manufacturers and the retailers. For, in the first place, there is no such antagonism between producers and consumers. Consumers themselves will in the long run be benefited by the adoption of price maintenance in the sense that, as we have seen, the welfare of the consumer depends ultimately on the prosperity of the producer. And in the second place, there is no such antagonism between manufacturers as a class and retailers as a class. The real conflict is found in the attitude of the few retailers who think that their interests would be jeopardized by the adoption of price maintenance, and whose success at present is being achieved at the cost of other more fair-minded competitors. When we consider that against this comparatively limited class stand the bulk of the retailers, the mass of the manufacturers and the permanent interests of the consumers, we are forced to the conclusion that in principle at least price maintenance is a logical inference from the doctrine of true competition, and that the denial of price maintenance denotes a perpetuation of the pseudo-competition from which modern American life is suffering. Those forms of price cutting which involve the 'leader' policy, the sale below cost, and the necessity of devious methods of securing supplies from others than the producers themselves, however profitable to the individual, are open to criticism as constituting destructive and not constructive competition, as being economically unsound and therefore ethically unjust. Price cutting of this kind, in short, is a form of unfair competition; price maintenance is a step toward fair competition." (pp. 268, 269.)

"We conclude accordingly that, apart from the particular form it may assume, the general principle of resale-price maintenance is legitimate. That type of price cutting which we have studied in this volume is a form of unfair competition; price maintenance is a step toward fair competition. It is economically defensible,

and therefore ethically desirable. The adoption of resale-price maintenance as a general principle will mean on the whole a step forward in American business life." (p. 276.)

To argue that because a person has bought and paid for an article which bears the trade-mark, brand or name of another, he has a constitutional right to do with it whatever he pleases, regardless of the effect of his conduct upon that other, or upon a public interest in the preservation of the latter's good will, is to urge a new and strange doctrine. The whole law of trade-marks and of unfair competition is a negation of such argument. The philosophy which underlies it commends itself neither to a sense of fairness nor to business expediency.

3. Section 1½ of the California Fair Trade Act is consistent with the development of the common law of unfair competition; its underlying principles have their counterpart in the common law; its terms are clear, definite and reasonable.

This Court has long recognized the general doctrine that unfair competition is the genus of which the technical law of trade-marks is one of the species. Relief against unfair competition is of common law origin, and may be considered as a branch of the law of torts. The concept of unfair competition has now been extended to include any conduct which artificially interferes with good will, and good will is no more than reasonable trade expectancy.

We have already referred to the practical results of such competition as appellant claims the constitutional right to indulge in—the tendency to disrupt contract relations; the deception of the public by the "leader" or "bait" device; the cheapening of the product in the public mind, damaging good will; the prevention of success-

ful distribution by making the product unprofitable to most dealers; the ultimate and inevitable deterioration of quality or the driving of the product from the market.

It cannot even be plausibly argued that the law of unfair competition must remain static, unable to cope with this situation.[11]

Nor should we suppose that it could reasonably be contended that a sovereign state is constitutionally forbidden to declare that its public policy regards conduct such as this statute is aimed at, as unfair competition, and to entertain in its courts civil actions for such redress as those courts may find appropriate. This, we respectfully submit, is the only question which this court is now called upon to decide.

Common Law Analogies.

Independently of any statute, the imposition of restrictions upon alienation of real property by contract between vendor and vendee, such restrictions being binding upon subsequent purchasers, are old in the law. (*Tulk* v. *Moxhay*, 2 Ph. 774 (1848).)

The possibility of extending such equitable servitudes to chattels, and the common law basis for such a possibility, are explored in an able article by Professor Zechariah Chafee, Jr., entitled "Equitable Servitudes on Chattels" published in XLI Harvard Law Review 945 (June, 1928).

[11] "Novelty is not a constitutional objection, since under constitutional forms of government each state may have a legislative body endowed with authority to change the law. In what respects it shall be changed, and to what extent, is in the main confided to the several states; and it is to be presumed that their Legislatures, being chosen by the people, understand and correctly appreciate their needs." (*Arizona Copper Co.* v. *Hammer*, 250 U. S. 400, 419.)

Professor Chafee points out that restraints on the alienation of land, binding sub-purchasers, are common and that similar restraints as to chattels are quite within the powers of courts of equity, should practical considerations require their assertion.

Professor Chafee reviews the problem from the historical standpoint, and believes that courts of equity have the necessary power if they choose to use it. Certainly, therefore, statutes having a similar effect are not arbitrary or without legal precedent.

In *Bitterman* v. *Louisville and Nashville Railroad Company,* 207 U. S. 205, this court, by holding that the non-transfer and forfeiture clauses in a railroad ticket were binding not only upon the original purchaser but also upon any other person who might have acquired the ticket, very strongly suggested the propriety of imposing a servitude upon chattels, the effect of which is to bind successive vendees.

This court from its inception has often upheld state statutes (See footnote 18, *post*) which limit absolute freedom to contract concerning, and to alienate, property, even though such statutes were not in line with the historic antecedents and common law analogies pointed out by Professor Chafee. Many such statutes went far beyond the California Fair Trade Act, in that they introduced entirely new economic experiments, often the exact opposite of the previous common law.

Another common law principle, consonant with the purpose and effect of Section 1½, is the doctrine of tortious interference with contract relations. *Lumley* v. *Gye,* 2 El. & Bl. 216 (1853) was the basis for the establishment, in nearly all common law jurisdictions, of the principle that the law will not permit a person willfully to induce an-

other to breach a contract, even though the means of inducement, standing alone, might be "legal."[12]

The acts against which Section 1½ permit redress might, independently of their admitted and willful interference with lawful contracts and their injury to good will, be perfectly proper. But that is no reason for saying that, in those instances where they have anti-social concomitants, they may not be curbed.

The California Supreme Court recognized, in passing upon Section 1½, this common law analogy, saying:

> "• • • The common law, without statutory authorization, long recognized that unjustifiable interference with contract rights of others constituted a tort. • • • The statute here involved, in a large measure, merely extends that common law doctrine to the transactions enumerated in the statute."

(Statement as to Jurisdiction, page 30.)

These principles have also been recognized by this court in passing upon state legislation. *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Association*, 276 U. S. 71, upheld a Kentucky statute which authorized cooperative marketing contracts and penalized anyone who knowingly induced violation of them, Mr. Justice McReynolds saying:

> "Counsel maintain that the Bingham Act takes from the warehouse company the right to carry on business in the usual way by accepting and selling the tobacco of those who voluntarily seek its services and thus unduly abridges its liberty. Undoubtedly the stat-

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[12] The leading cases are collected in: Carpenter, Interference with Contract Relations, 41 Harvard Law Review 728 (1928), and Sayre, Inducing Breach of Contract, 36 Harvard Law Review 663 (1923). This court applied and approved the common law doctrine in *Angle* v. *Chicago, St. Paul, Minneapolis, and Omaha Railway Company*, 151 U. S. 1.

ute does prohibit and penalize action not theretofore so restricted and to that extent interferes with freedom. *But this is done to protect certain contracts which the legislature deemed of great importance to the public and peculiarly subject to invasion. We need not determine whether the liberty protected by the Constitution includes the right to induce a breach of contract between others for the aggrandizement of the intermeddler—to violate the nice sense of right which honorable traders ought to observe.*

* * * * * *

Viewing all the circumstances, it is impossible for us to say that the legislature of Kentucky could not treat marketing contracts between the Association and its members as of a separate class, provide against probable interference therewith, and to that extent limit the sometime action of warehousemen." (276 U. S. 71 at pp. 91 *et seq.;* italics added.)

The Terms of the Statute Are Clear and Reasonable.

While, as has been seen, the Fair Trade Act is not a price fixing measure, it is incidentally and operatively concerned with prices. A study of the statute discloses that the California legislature has carefully and effectively circumscribed its application and operation. The limitations upon the permission granted are obviously calculated to prevent harm to the public which might result from legalizing exorbitant prices or monopoly upon anything but the rights pertaining to a trade-mark or name.

The fact that the prices maintainable under Section 1½ originate in private contracts rather than by the action of governmental authority does not render the measure less reasonable. It renders it less rigid. The fixing of a

definite price, or minimum price, for all of a category of commodities (such as milk in the Nebbia case), by the action of a governmental body far more definitely compels the public to pay higher prices, and far more clearly prevents competition, than does the plan of merchandising authorized by the Fair Trade Act.

Under the Fair Trade Act every producer of an identified product must continue to reckon with the price charged by his competitor, he is under no compulsion to establish any price and natural laws of supply and demand prevent any economically significant establishment of unreasonable prices.

The validity of Section 1½ is not affected by saying that in extreme, imaginary and improbable fact conditions, its enforcement might work hardship or might be difficult. This court has frequently held that such difficulties are irrelevant and that determination of constitutional questions should be based primarily upon the facts before the court in a particular case.[13]

This case comes to this court upon a judgment entered after the sustaining of a demurrer to the complaint without leave to amend. The facts alleged, for the purpose of this proceeding, are admitted to be true. They clearly show that appellant is not beset with any imaginary complications and hypothetical difficulties.

Moreover, the act itself provides all the safeguards against injustice afforded by orderly procedure in civil courts, where, naturally, every defense is available and

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[13] *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. *Gorieb* v. *Fox*, 274 U. S. 603. *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165. *Yazoo and Mississippi Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217. *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571.

without drastic penalties to coerce compliance.[14] The trial courts can deal with special situations as they may arise in specific cases.

These considerations, it is submitted, point the error of such suppositious contentions of appellant that the statute is arbitrary because the moving party may discriminate in proceeding or not proceeding against dealers who cut the price,[15] or because different contracts might stipulate different prices, or because a stranger to any interest in the trade-mark might attempt to take advantage of the statute, or because the mark may not really symbolize a valuable good will, and all other similar fanciful objections which presume unjust applications of the statute by courts of justice.

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[14] Section 307 of the California Code of Civil Procedure provides:

> "There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs."

Thus, it is the settled law of the state that:

> "* * * Under the code system of practice a defendant is allowed to set up as many defenses as he may have, regardless of the question as to whether they are of a legal or equitable nature, because the distinction which exists under the common-law system between actions at law and suits in equity and the forms thereof have been abolished. Whether a party is to seek his remedy or avail himself of his defense in law or equity is no longer a question, for we have but one forum, which combines all the powers of a court of law and a court of chancery, and exercises both through the same forms, and may exercise both in the same action."
>
> (1 California Jurisprudence 313.)

[15] The fact that a statute conferring rights does not compel their exercise at all, or permits exercise in some instances and not others, certainly does not make the statute unconstitutional. The same argument could be made against any statute which prescribes civil rights and remedies.

II. THE CONSTITUTION OF THE UNITED STATES DOES NOT PROHIBIT A STATE FROM MAKING ITS COURTS ACCESSIBLE TO A PRODUCER OR DISTRIBUTOR FOR THE ENFORCEMENT OF RESALE PRICES ON GOODS IDENTIFIED BY HIS NAME, ESPECIALLY WHERE SUCH ACCESS IS FOR THE PROTECTION OF RIGHTS DERIVED FROM LAWFUL CONTRACTS AND FROM THE OWNERSHIP OF TRADE-MARKS, BRANDS AND NAMES.

A. The presumption of constitutionality is particularly applicable to this statute.

Statutes often deal, as does Section 1½, with economic questions concerning which there is a wide divergence of public and expert opinion. But the wisdom of policy underlying statutes is not the test of their constitutionality.[16] The courts are not called upon to resolve controversies in economics.

"Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." (*Nebbia* v. *New York*, 291 U. S. 502, at pages 537, 538. Italics added.)

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[16] Courts of last resort in California, Illinois and New York have passed upon the precise question now before this court. The Supreme Courts of California and Illinois (*Max Factor & Co.* v. *Kunsman*, 5 Cal. (2) 446; 55 Pac. (2) 177; *Joseph Triner Corporation* v. *McNeil*, 363 Ill. 559, 2 N. E. (2) 929, *Seagram* v. *Old Dearborn*, 363 Ill. 610, 2 N. E. (2) 940, holding the statute constitutional, refused to follow the New York Court of Appeals decision that the statute was unconstitutional (*Doubleday, Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272, 199 N. E. 409). The Vice Chancellor in New Jersey agreed with the New York Court of Appeals, *Johnson & Johnson* v. *Weisbard*, 120 N. J. Eq. 314, 184 Atl. 783.

B. Section 1½ of the California Fair Trade Act does not deprive any person of liberty or property without due process of law.

Section 1½ of the California Act is attacked on the ground that it involves the deprivation of property and liberty without due process of law, the theory being that when a man buys goods bearing Pyroil trade-marks the property is his and to limit his right to dispose of it in any way he sees fit, deprives him of his property and liberty. This seems to us to involve an obvious fallacy which analysis will at once expose.

When appellant buys Pyroil, it may be admitted that it owns the contents of the container and the container itself, but the thing that makes Pyroil salable, namely, the trade-mark on the container, appellant does not own. The purpose of the Act as expressed in its title is to "protect trade-mark owners, distributors * * * against injurious and uneconomic practices, etc."

Appellant does not own the good will symbolized by the Pyroil trade-mark.

The property right in California, to the Pyroil trade-mark, is the creation of the law of California. By Section 1½ of the Fair Trade Act the State of California specifies acts regarded as injurious to the trade-mark property which owes its existence to the law of that State. It is merely giving additional protection to rights which it originally brought into being.[17]

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[17] Cal. Civil Code, Sec. 655:

"There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the good will of a business, trade-marks and signs, and of rights created or granted by statute."

The nature of a trade-mark is such that its owner cannot keep it in possession but must necessarily entrust its use to thousands of dealers and, if it is a valuable trade-mark, it passes into the hands of millions of consumers. Despite the physical parting with the tangible commodities and the transfer of title to them, ownership of the mark identifying such commodities does not pass with their physical transfer. Legislation therefore dealing with the treatment which must be given a trade-mark by one who is not the owner, into whose hands goods bearing the mark may come, does not deprive such persons of their property or restrict them in the use of it, since the title to the *commodity* bearing a trade-mark and title to the *trade-mark* itself are separate and distinct.

The unmistakable purpose of the California statute under discussion here is not to prevent a dealer from using what he owns (the commodity itself), but to prevent willful injury to a third person's property in the trade-mark which the dealer does not own. This is a proper legislative object and since the means adopted are reasonable and effective, Section 1½ meets all requirements of due process.[18]

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[18] Thus this court has held that a legislature may:

Fix the charges made by the owners of grain warehouses and elevators (*Munn* v. *Illinois* (1876), 94 U. S. 113; *Brass* v. *North Dakota* (1894), 153 U. S. 391; *Budd* v. *New York* (1892), 143 U. S. 517).

Fix the charges made by insurance companies (*German Alliance Ins. Co.* v. *Lewis* (1914), 233 U. S. 389).

Limit agents' commissions on fire insurance policies (*O'Gorman* v. *Hartford Insurance Co.* (1931), 282 U. S. 251).

Require miners to be paid per ton of coal unscreened instead of screened (*McLean* v. *Arkansas* (1909), 211 U. S. 539; *Rail & River Coal Co.* v. *Yaple* (1915), 236 U. S. 338).

Require employers who pay their men in store orders to redeem them in cash (*Knoxville Iron Co.* v. *Harbison* (1901), 183 U. S. 13; *Dayton Coal & I. Co.* v. *Barton* (1901), 183 U. S. 23; *Keokee Cons. Coke Co.* v. *Taylor* (1914), 234 U. S. 224).

Fix the fees chargeable by attorneys appearing for injured

Whether the provisions of Section 1½ of the Fair Trade Act are wise or unwise is not an issue. As this court said in *Northern Securities Co.* v. *United States,* 193 U. S. 197, 337:

> "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine."

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employees before Workmen's Compensation Commissions (*Yeiser* v. *Dysart* (1925), 267 U. S. 540).

Fix the rate of pay for overtime work (*Bunting* v. *Oregon* (1917), 243 U. S. 426).

Regulate attorneys' fees for preparing and prosecuting pension claims (*Frisbie* v. *U. S.* (1895), 157 U. S. 160).

Fix the time within which the services of employees must be paid for, and provide for semi-monthly payments of wages (*Erie R. R. Co.* v. *William* (1914), 233 U. S. 685).

Establish maximum hours of labor for men (*Holden* v. *Hardy* (1898), 169 U. S. 366).

Establish maximum hours of labor for women (*Muller* v. *Oregon* (1908), 208 U. S. 412; *Miller* v. *Wilson* (1915), 236 U. S. 373).

Prohibit the payment of wages in advance (*Patterson* v. *Bark Eudora* (1903), 190 U. S. 169; *Strathearn Steamship Co.* v. *Dillon* (1920), 252 U. S. 348).

Require that loaves of bread of only a certain size be sold (*Schmidinger* v. *Chicago* (1913), 226 U. S. 578).

Prohibit the sale of berries in any containers except in those of prescribed dimensions (*Pacific States Box and Basket Co.* v. *White* (1935), 296 U. S. 176).

Fix the maximum rate of interest chargeable on loans (*Griffith* v. *Connecticut* (1910), 218 U. S. 563).

Regulate sales of merchandise in bulk (*Lemieux* v. *Young,* (1909), 211 U. S. 489).

Regulate the net weight of retail packages (*Armour* v. *North Dakota* (1916), 240 U. S. 510).

Declare sales of commodities on margin or for future delivery void (*Booth* v. *Illinois* (1902), 184 U. S. 425; *Brodnax* v. *Missouri* (1911), 219 U. S. 285).

Forbid unfair competition by the charging of lower prices

And as the court declared in *Nebbia* v. *New York*, 291 U. S. 502, 537:

> "*And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory, it does not lie with the courts to determine that the rule is unwise.* With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. (Italics added.)
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> • • • • • •
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> (Page 532)
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> The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago."

There have been strong intimations by this court that

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in one locality than those exacted in another (*Central Lumber Co.* v. *South Dakota* (1912), 226 U. S. 157).

Forbid giving trade inducements to purchasers, by imposing a prohibitive tax on merchants giving such inducements (*Rast* v. *Van Deman & L. Co.* (1916), 240 U. S. 342).

Authorize a board to fix the retail price of milk (*Nebbia* v. *New York* (1934), 291 U. S. 502).

Prohibit interference with cooperative marketing contracts (*Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-operative Marketing Association* (1928), 276 U. S. 71).

Authorize the Secretary of Agriculture to fix charges made by marketing agencies in stockyards (*Tagg Bros.* v. *U. S.* (1930), 280 U. S. 420).

legislation, such as that now before it, is valid. In *Dr. Miles Medical Company* v. *John D. Park & Sons Company,* 220 U. S. 373, 405, this court passed upon a system of price maintenance, quite similar to that in the case at bar, but attempted without the sanction of any statute whatsoever. It is not without significance to the present issue that the court, speaking through Mr. Justice Hughes, remarked:

> "Nor can the manufacturer by rule and notice, *in the absence of contract or statutory right,* even though the restriction be known to purchasers, fix prices for future sales." (Italics added.)

In *Boston Store* v. *American Graphophone Co.,* 246 U. S. 8, 25, Chief Justice White said:

> "Moreover, so far as the argument proceeds upon the assumption of the grave disaster which must come to the holders of patent rights and articles made under them from the future application of the doctrine which the cases establish, it must be apparent that if the forebodings are real the remedy for them is to be found, not in an attempt judicially to correct doctrines which by reiterated decisions have become conclusively fixed, but in invoking the curative power of legislation."[19]

The general validity of both state and federal anti-trust legislation has been so well established by repeated decisions of this court that citation of authority is pointless. That fact has significant pertinency to the statute before the court in this case. Anti-trust statutes are, almost without exception, the declaration of a policy prohibiting agreements to maintain prices. The restraint placed by such statutes upon freedom of contract, person, and property has been even more extensive than that alleged by the appellant in this case to result from the operation of Section 1½ of the Fair Trade Act.

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[19] Compare the concurring opinion of Mr. Justice Brandeis at page 27.

Since, in support of one public policy, a state legislature may absolutely forbid price maintenance, it seems no more than reasonable that it may, in support of another public policy, permit price maintenance and provide means for making it effective. Public policy is always subject to change.[20]

Section 1½ has been assailed as being an unconstitutional delegation of legislative power. In so far as the argument pertains to the Constitution of the State of California, this court is not concerned with it in this appeal, for the Supreme Court of a state is the final arbiter on a question of the conflict between a state statute and a state constitution.[21] The Supreme Court of California held that there is nothing in this act that is contrary to the Constitution of California. (R. 42.) Also, it is obvious that there is not involved any question of the application of Article 1, Section 1, of the Federal Constitution, which vests all legislative powers of the United States in the Congress, or Article 1, Section 8, of the Federal Constitution, which empowers the Congress to make all laws necessary and proper for carrying into execution its enumerated powers.

However, a delegation of legislative power may amount to a denial of due process of law.[22] But to be a denial of due process, the legislation must be clearly arbitrary, unreasonable or capricious. Thus, in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, Mr. Justice Sutherland characterized the delegation there involved as "clearly arbitrary". Likewise, in *Eubank* v. *Richmond*, 226 U. S. 137, the legislation under attack was condemned because it was, in the

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[20] *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 55, 58, 59.

[21] *Merchants' and Mfrs.' Nat Bank* v. *Pennsylvania*, 167 U. S. 461. *Michigan Central R. Co.* v. *Powers*, 201 U. S. 245.

[22] *Washington* v. *Roberge*, 278 U. S. 116 (14th Amendment). *Eubank* v. *Richmond*, 226 U. S. 137 (14th Amendment). *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (5th Amendment).

words of Mr. Justice McKenna, "an unreasonable exercise of the police power."

Therefore, even if Section 1½ of the California Fair Trade Act could be construed as involving a delegation of legislative power to private individuals, it would nevertheless withstand the test of constitutionality because it is not an unreasonable, arbitrary, or capricious measure, inappropriate for the accomplishment of any legitimate legislative end. The entire discussion of the statute which we have presented in this brief is pertinent to this point.

The argument that Section 1½ delegates legislative power to private individuals proceeds from a misconception of its nature and purpose. The contention might have some cogency if Section 1½ were in its essence a price-fixing measure. But it is not. It does not become so merely because it recognizes the simple economic truth that there is a relationship between stability of price in trade-marked goods and the good will attached to the trade-mark by which the goods are distinguished from competing merchandise; nor because it declares that the willful cutting of prices below those established in lawful contracts is a variety of unfair competition, for which the courts of the state may grant a civil remedy to a person injured thereby.

The Federal Constitution does not expressly forbid state legislatures from delegating authority. By construction, delegation is only forbidden when it is of such a nature as to violate due process.[23]

Perhaps the most obvious answer, as far as this case is concerned, to the assertion that the California Fair Trade Act is unconstitutional because it "delegates" to private persons the right to fix resale prices on their trade-marked goods, is a simple denial. In California, contracts estab-

[23] *Dreyer* v. *Illinois*, 187 U. S. 71, 83. *Montana Co.* v. *St. Louis Mining Co.*, 152 U. S. 160, 165.

lishing resale prices were lawful before the Fair Trade Act was passed.[24] So far as the right to make such contracts is concerned, since it existed before the Act, the Act does not delegate anything to anybody.

With respect to Section 1½, the Supreme Court of California regarded it merely as a statutory statement of existing law, based on *Lumley* v. *Gye*, 2 El. & Bl. 216, that interference with contracts is actionable. So it seems to us that the argument that there is delegation of any power by this Act is fantastic. Where a thing existed before the statute, the statute cannot "delegate" it.

Moreover there is a great distinction between delegating what is in effect law-making power to a board or code authority which determines liability *a priori* and providing access to regularly constituted civil courts to redress an intentional act resulting in damage. It cannot be a delegation of legislative power for the legislature of California to confer on the courts of California jurisdiction to try an issue in a civil suit. Every case brought in the California courts under the authority of Section 1½ will be decided on its own facts and every defense will be available. It seems to us irrational to argue that one who is given his day in court in a civil proceeding and the right of appeal, is denied due process.

It seems equally irrational to say that a statute which does not set up a standard applicable to every conceivable case is void for the reason that judicial legislation is required to enforce it. In *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 69, where a similar attack was made on the general terms of the Sherman Act, Mr. Justice White said:

> "So far as the arguments proceed upon the conception that in view of the generality of the statute it is

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[24] *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745 (1909). *D. Ghirardelli Co.* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041 (1912).

not susceptible of being enforced by the courts because it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. The statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions therefore but insist that, consistently with the fundamental principles of due process of law, it never can be left to the judiciary to decide whether in a given case particular acts come within a generic statutory provision. But to reduce the propositions, however, to this their final meaning makes it clear that in substance they deny the existence of essential legislative authority and challenge the right of the judiciary to perform duties which that department of the government has exerted from the beginning. This is so clear as to require no elaboration. Yet, let us demonstrate that which needs no demonstration, by a few obvious examples. Take for instance the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition, depending upon wrongful intent. Take questions of fraud. Consider the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce."

If a statute should declare the right of a land owner to post a sign on his property, declaring the hours of the day during which no one might pass over the land and defining passage over the land during the forbidden hours as trespass, we suppose that no one would seriously contend that there was a delegation of legislative power simply because the statute left the owner free to designate the particular hours.

We do not suppose that appellant would question the

validity of a statute which provided that the owner of any chattel shall be free to sell it at any price he chooses. That is the very thing for which appellant here contends. Yet appellant's argument would invalidate such a statute as involving a delegation of legislative power because it leaves the owner of the chattel, a private individual, free to fix his own sale price.

Section 1½ is not a delegation of power, it is the conferring of a private right and providing a civil remedy for willful violation of it. It is only "delegation of power" in the sense that the creation of any property right is. Every property right involves control over, or restraint of, others. This control is delegated in the sense that it is secured or protected by the state. But it is a fundamental error to characterize this power, as appellant does, as law making. There is no more delegation of legislative power involved in the protection of the right to make lawful contracts effective and trade-marks secure, than in the exercise of the common law right of an owner to sell his property at his own price, or the right of a manufacturer, as the principal, to establish resale prices by agency contracts with 21,000 dealers throughout the country (*U. S.* v. *General Electric Co.*, 272 U. S. 476) or the right of a producer to contract for resale prices on trade-marked goods which existed in California before the Fair Trade Act was passed.

Appellant, in characterizing the statute as an unconstitutional delegation of legislative power, seeks to bring it within the rule of such cases as *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116; *Eubank* v. *Richmond*, 226 U. S. 137; and *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190. The key to the doctrine of all such cases is found in the arbitrary nature of the statutes involved plus their attempted transfer of authority ordinarily exercised by the

legislative branch of the government. Thus in the cited cases, each of the statutes:

1. Transferred to an individual or individuals the power to prescribe rules of conduct, *i. e.*, to legislate;

2. Provided for the enforcement of such rules by penalties, or the equivalent of penalties, unrelated to the extent of the injury, if any, caused by the violation of such rules;

3. Afforded no opportunity for adequate review by the courts.

Section 1½ of the Fair Trade Act is not a transfer of the power to prescribe rules of conduct; it is an exercise of that power by the California legislature. The statute here imposes no penalties and it makes injury a condition precedent to relief. The very right to relief provided by the statute here, is no more than to give access to courts of justice with all the attendant safeguards of fair and orderly procedure as well as appellate review.

Section 1½ simply authorizes a trade-mark owner to resort to the courts, if he so desires, for the protection of lawful contracts and to safeguard the good will represented by his trade-mark, brand or name. It permits him to bring a suit for unfair competition against anyone who would wilfully[25] injure his rights in such contracts and symbols,—to go into court if he wants to and prove his case if he can. To call this a delegation of legislative power would equally condemn all laws by which legislatures authorize men to adopt appropriate measures to protect their property rights against the willful conduct of others which may impair their value.[26]

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[25] To be actionable under Section 1½ the acts must be done "wilfully and knowingly," and result in legal damage. Compare *Fairmont Creamery* v. *Minnesota*, 274 U. S. 1, with *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, and *State* v. *Bridgeman & Russell*, 117 Minn. 186.

[26] See article "The Constitutionality of the New York Fair Trade Act," Virginia Law Review, March, 1936, pp. 556, 560, 561.

C. Section 1½ of the California Fair Trade Act does not deny to any person the equal protection of the laws.

It is contended that Section 1½ denies equal protection of the laws by discriminating between trade-marked and non-trade-marked commodities, and between the manufacturers or dealers of each.

So far as the claim of discrimination relates to manufacturers, appellant is not in a position to complain, for it is not alleged, nor does appellant claim to be, a manufacturer. A litigant may question a statute's validity only when and so far as it is being, or about to be, applied to his disadvantage.[27]

The Fair Trade Act is designed to apply to "articles of standard quality under a distinguished trade-mark, brand or name". It applies only to articles which are "in fair and open competition with commodities of the same general class produced by others". The act, therefore, embraces within its terms a large but distinct class of articles, which are fairly differentiated from all other articles. Obviously, the legislature has seen fit to classify all commodities into two great groups: (1) those which bear no distinguishing trade-mark, brand or name of the producer or owner, and (2) those which do. It has further determined that the latter group requires, for reasons not applicable to the other, legislative safeguards in the interests of the "owners, distributors and the public".

There are inherently sound and controlling reasons for limiting the provisions of the statute to commodities identified by trade-marks, brands and names. An effort to maintain a resale price upon goods not so distinguished would be futile and impossible of practical execution. If the pro-

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[27] *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217. *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571.

ducer or distributor of a quantity of grain attempted to establish a price binding upon subsequent vendees, the very nature of the commodity would frustrate the attempt. Being in free and open competition with other articles in no way distinguishable, there would be no practical means of imposing such a limitation except by packaging it or identifying it in a manner which would meet the requirements of the Fair Trade Act. It cannot be reasonably said that the legislature has exceeded its powers in making such a classification, or that such a classification is wholly unreasonable, arbitrary or capricious, in view of the compelling fact that the legislature's purpose could not be carried out under any different classification.

In *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, this Court laid down the rules by which this question must be tested. In that case, there was a state statute directed against pumping from wells bored or drilled into rock, but not against pumping from wells not penetrating rock; and also against pumping for the purpose of collecting gas and vending it apart from the waters, but not against pumping for other purposes. The contention was made that the statute was arbitrary in its classification, and denied the equal protection of the laws to those whom it affected. The court denied this contention, and held the statute constitutional, laying down the following fundamental rules (p. 78):

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with

mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

In *Keokee Consolidated Coke Co.* v. *Taylor,* 234 U. S. 224, Mr. Justice Holmes said, at p. 227, of the statute prohibiting the payment by mining and manufacturing companies of wages in other than lawful money:

"It is more pressed that the act discriminates unconstitutionally against certain classes. But while there are differences of opinion as to the degree and kind of discrimination permitted by the 14th Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the legislature to judge unless the case is very clear. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 81. *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 160. *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144.

The suggestion that others besides mining and manufacturing companies may keep shops and pay their workmen with orders on themselves for merchandise is not enough to overthrow a law that must be presumed to be deemed by the legislature coextensive with the practical need."

See also *Gorieb* v. *Fox,* 274 U. S. 603.

VI.

Conclusion.

Section 1½ of the California Fair Trade Act is a valid exercise of the legislative power of the state, reasonably designed to accomplish a proper legislative object. It is a statutory development of the law of unfair competition. It affords legitimate protection to property rights in trademarks, brands and names. It violates no provision of the Constitution of the United States.

The judgment of the Supreme Court of the State of California should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 55.

THE PEP BOYS, MANNY, MOE & JACK OF CALIFORNIA,

Defendants-Appellants,

v.

PYROIL SALES COMPANY, INC.,

Plaintiff-Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED MAY 13, 1936.

BRIEF FOR AMERICAN BOOKSELLERS' ASSOCIATION, *AMICUS CURIAE*

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APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED MAY 13, 1936.

BRIEF FOR AMERICAN BOOKSELLERS ASSOCIATION, *AMICUS CURIAE.*

May it please the Court:

Defendants-appellants will be referred to throughout as defendant and the appellees as plaintiffs.

The case involves the question whether the so-called California Fair Trade Act which applies the doctrine of unfair competition to the protection of vertical resale price contracts relating to trade-mark commodities is in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

The case arises on demurrer and the facts as pleaded are admitted.

The Admitted Facts (T. R. 1-21).

Plaintiffs are engaged in the sale of "Pyroil" commodities. Plaintiffs established certain wholesale and retail prices for said trademarked products (T. R. 4), but there developed years ago a practice among certain "Cut Rate Stores" of selling trademarked products at prices conspicuously below the established prices and the resulting retaliatory price-cutting caused the goods in many cases to be sold at a loss thus depriving the producer of a market and injuring or destroying his good-will (T. R. 2-3).

To remedy the many evils of these price-cutting practices, California passed an act entitled and reading as follows:

> "An act to protect trademark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name.
>
> (Approved May 8, 1931, Stats. 1931, p. 583. In effect August 14, 1931.)
>
> 1. Certain sale contracts declared lawful.
> 2. Exception.
> 3. Definition.
> 4. Constitutionality.
> 5. Short title.

1. Certain Sale Contracts Declared Lawful.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

"2. Exception.—This act shall not apply to any contract or agreement, between producers or between wholesalers or between retailers as to sale or resale prices.

"3. Definitions.—The following terms, as used in this act, are hereby defined as follows:

'Producer' means grower, maker, baker, manufacturer or publisher.

'Commodity' means any subject of commerce.

"4. Constitutionality.—If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

"5. Short title.—This act may be known and cited as the 'Fair Trade Act'."

The Section in Question.

Section 1½ of said Fair Trade Act was added in 1933 (Stats. 1933, Chapter 260, page 793) and provides as follows:

"Sales below contract price.—Wilfully and knowingly advertising offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

Plaintiffs, as authorized by the Act, made contracts with wholesalers and retailers in California prescribing fair and reasonable prices for their trademarked goods, said prices being admittedly no higher than required to yield the distributors a reasonable compensation for their services (T. R. 3).

A contract was tendered to defendant who refused to execute it and thereupon plaintiff refused to sell to defendant (T. R. 4).

Defendant thereupon secured said trademarked products from sources unbeknown to plaintiffs and sold and continues to sell them at cut prices without closing out the line (T. R. 4-5).

Unless defendant is restrained under the Fair Trade Act, plaintiffs' dealers will cancel their contracts so as to be free to meet defendant's prices, predatory price cutting will again ensue, plaintiffs' business and good-will will be injured if not wholly destroyed, and plaintiffs' distributors will be prevented from earning a reasonable profit in the sale of plaintiffs' trademarked products (T. R. 5-6).

Plaintiffs have no remedy at law and seek an injunction to restrain defendant from selling plaintiffs' trademarked commodities at prices less than those prescribed in the retail contracts (T. R. 5-6).

The demurrer was sustained by the Superior Court but overruled on appeal by the Supreme Court of California.

As the book departments of department stores, cut rate chain stores, catalog houses and the like have largely become "loss leader" departments, to the grave injury of independent book dealers, American Booksellers' Association has applied for leave to file this brief as *amicus curiae* in support of the constitutionality of the Act in question.

The Question.

The question is whether there is anything in the Federal or the State Constitution which inhibits California:

a. From legalizing the trademark contracts in issue.

b. From protecting such contracts against destruction or injury by non-contracting dealers.

This brief is directed to the Federal question which is whether the contracts themselves or Section 1½ of the Act, either or both, are in violation of Section 1 of the 14th Amendment to the Federal Constitution, reading:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

California has lifted the ban of the common law rule against alienation* and of the rules and statutes against restraints of trade from vertical but not horizontal contracts relating to resale prices of trademarked articles of

---

*". . . a general restraint upon alienation is ordinarily invalid. 'The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void.' 'If a man', says Lord COKE, in 2 Coke on Littleton, sec. 360, 'be possessed . . . of a horse or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest and property is out of him, so as he hath no possibility of a reverter; and it is against the trade and traffic and bargaining and contracting between man and man.' John D. Park & Sons Co. *vs.* Hartman, 12 L. R. A. (N. S.) 146, 82 C. C. A. 158, 153 Fed. 24. See also Gray, Restraints on Alienation of Property, Secs. 2, 28." Mr. Justice HUGHES in *Dr. Miles Med. Co.* vs. *John D. Parks & Sons Co.*, 220 U. S. 373, 55 Law Ed. 503.

a competitive nature while in lively course of trade and subject to definite exceptions as to close-out or "dead line", deterioration or court order sales, and has enacted Section 1½ to protect such contracts against wilful nullification by non-conforming dealers.

Defendant apparently seeks to present the case as though it concerned an attempt by the state to subject plaintiff's trademarked goods owned outright by defendant, to the servitude of admittedly fair prices set up by contracts made by others before or subsequent to appellant's acquisition of title.

But that question does not arise in this case or in real trade practice. The Act permits defendant to close out his supply of plaintiffs' trademarked goods, however acquired, at any prices he pleases and at any time, and whether acquired before or after the contract system is set up.

That is not what defendant seeks. He claims that the 14th Amendment guarantees him a sort of vested right to continue to purchase new supplies of plaintiffs' trademarked products from secret sources and to sell them right along in California at cut or close-out prices without closing out the line and without liability for damages for the admitted nullification or cancellation thereby worked upon the contracts.

And the question is: does the 14th Amendment to the Federal Constitution guarantee to defendant any such alleged right to continue a cut-rate business in plaintiff's trademarked products after the contracts have been set up?

Defendant admits that when he cuts the price on plaintiffs' products, other dealers have to meet the cut or close out the line and competition finally brings the price to a loss level.

The question then comes down to this:

Defendant claims that the 14th Federal Amendment guarantees him a continuing right to fix a loss-price on plaintiffs' branded goods in the hands of their dealers but denies that said amendment guarantees plaintiffs a right to fix a reasonable and profitable price on the same trade-marked goods in the hands of defendant, and the question is as to the legislative and judicial power of California to regulate these conflicting rights in the public interest.

It is settled doctrine that the judicial power of this court is limited:

1. To determining whether the subject-matter of the legislation is within the state's power under the Federal constitution; that is, whether the state legislature has power to limit, control or regulate methods of trade and competition within the state.

2. To determining whether the means adopted (a) by legalizing vertical contracts as to competitive trade-marked goods with the close-out sale and other exceptions noted, and (b) by declaring that wilful interference is actionable as unfair competition, are violative of the Federal constitution because they are:

1. Not reasonably designed to accomplish the purpose in view;

2. Do not have a real and substantial relation to the objects sought to be accomplished;

3. Are arbitrary, discriminatory or capricious.

Nebbia v. *New York*, 291 U. S. 502, 54 Sup. Ct. R. 505.

It is submitted that a correct answer to these questions requires a full consideration of the entire trade situation with which California had to deal and we have taken up the matter in that way as to both intrastate and interstate commerce in California.

Summary.

1. A trademarked or branded commodity is a special fungible:

(a) Constituting an exception to the rules concerning alienation and trade-restraints,

(b) therefore capable of being transferred subject to a valid restriction voluntarily assumed by the new owner to resell only at a certain contract price which is being currently charged by other contract-dealers handling the same trademarked article.

(c) Therefore, the State, under its regulatory and police powers, may lawfully outlaw, as unfair competition, the business of dealing in such trademarked commodity at a cut or non-contract price unless:

(1) To sell out the line or

(2) When the commodity is damaged or deteriorated.

(3) Under order of court.

2. A trademarked commodity is a special fungible, properly excepted by the state from the operation of the rules against alienation and restraints of trade, and therefore capable of transfer under a lawful contract restricting the resale price, and the state therefore has power to protect such contracts against nullification by strangers, under the doctrine of unfair competition, because all of the commodities identified by a certain trademark:

(a) Come from one common source of origin.

(b) The source is publicly advertized on the article by the display of the trademark.

(c) All similar articles under that trademark are standardized as to quality and interchangeable as to value.

(d) The trademark owner receives good-will for good quality or bad-will for defects.

(e) All such articles under one trade-mark, being stamped as standard as to origin and value by the trademark, are capable of being sold only at one price at the same time in the same market. That is to say when one dealer in a certain shopping market marks down an Ingersoll Dollar Watch or a book called "Anthony Adverse" of a certain edition, that dealer thereby marks down that watch or that book to that same price on the shelves of all other dealers in that market at that time, because the operation of the law of market price is inexorable and inescapable. There can be only one price for the same thing in the same market at the same time. The trademark or imprint is the public symbol and guarantee that the Ingersoll watch or the book "Anthony Adverse" is *the same thing* as every other "Ingersoll" or "Anthony Adverse", whether in the hands of one dealer or another. Therefore one dealer would not even try to charge the regular contract price for that thing if another dealer in the same article was offering it at a lower price at that time. This fact is admitted in the case at bar.

(f) There can be no such thing as true individual freedom as to trademarked fungibles such as Ingersoll watches, Ford automobiles or books of the same title, edition and imprint or the like. Two men may own a dog but if one owner decides to kill his half,

he kills the other man's half also. King Solomon wisely decided that the woman who was willing to take one severed half of a live child did not own either half.

(g) When defendant argues that he merely wishes to do with his own as he pleases, plaintiff answers that he can do that lawfully by closing out the line. But when defendant argues that he should be permitted to keep on injuring all other dealers by stocking up with a new supply so as to go on selling right along at cut prices, then defendant is disingenuous in claiming that the 14th Amendment guarantees him a right thus to mark down the price of the same article on the shelves of thousands of other dealers in the same article in the same market at the same time, as he admittedly does.

(h) On the ground of the greatest good to the greatest number, the 14th Amendment guarantees the right of these thousands of regular dealers to purchase the same thing for resale under lawful contracts at the same admittedly reasonable price as is charged by other dealers and to look to the state to guard such lawful contracts against destruction by scab dealers or price-cutters like the Ticket Scalpers whose business was enjoined and destroyed by this Court in *Bitterman* v. *Louisville and Nashville Railroad Co.*, 207 U. S. 205, 52 L. Ed. 171.

(i) Such trademarked fungibles usually are sold at an advertized price, frequently marked on the article, and, where freight is material, F. O. B. a base point.

(j) It is really the producer and not the retailer who promotes the sale of a trademarked commodity. The retailer collects the retail price but the producer does the advertizing.

(k) Producer advertizing is diametrically opposite to all legitimate dealer advertizing. The legitimate dealer advertizes in effect "Come to my store and buy on my reputation as a retailer." The producer advertizes "Buy my branded article wherever you find it. It is just as reliable—just the same thing—when sold by one retailer as another." The retailer seeks to instill his advertizing and good-will into his store; the producer, into his *branded product.* When a retailer advertizes a branded product at a cut price, he is indulging in lawful larceny. He is stealing the producer's national or product-advertizing for the retailer's ulterior purpose. Price-cutting is a cheap way of drawing trade to an unscrupulous retailer who does not care how much he injures the branded product by driving it down to a price level at which legitimate dealers cannot make a profit on it. The difference between product-advertizing or so-called "national-advertizing" of a producer of a trademarked product, on the one hand, and of a legitimate retailer who advertizes himself or his store rather than seeking to magnetize a particular branded product with his good-will or reputation, strongly emphasizes the fact that a trademarked or nationally advertized article is a very special kind of property constituting an exception to the rule against alienation. The producer can lawfully buy and pay for the advertizing of a self-selling or magnetized trademarked product, but a tricky retailer can then lawfully steal the advertizing for himself, unless the act in question is valid.

3. Where *the same thing* (*i. e.,* articles whose fungibility and common source of origin are attested by the producer's trademark) can have only one price at the same time in the same market (because no purchaser will pay more than the lowest price offered in that market and no seller will take less), the question is whether that *one price* shall be set by

knaves acting for some ulterior purpose of their own, as Mr. Justice HOLMES fairly stated it in his dissenting opinion in *Miles* v. *Park,* 220 U. S. 373, 55 L. Ed. 502, 31 Sup. Ct. 376, or whether that one price shall be set by voluntary contracts between the producer and the great body of dealers (who, along with the public, do not have to buy the article at all or can freely turn to a competitive make)? When knavish or loss-leader competition sets the standard, uniform or one and only price which a standard article can bring at that time in that market, we see conditions like those under which the Modern Library (Dollar) Books were advertized by price-cutters for sale in the New York market new at *nine cents per copy!* We see R. H. Macy & Co. admittedly paying one dollar per copy for Amelie Rives' "The Castaway" and reselling it at *eighty-nine cents!* (See opinion in *Bobbs-Merrill* v. *Straus,* 210 U. S. 205.) Scab labor cannot long endure at a below-cost standard of living, but a scab-price-cutter can lose heavily on "The Modern Library" or the "Castaway" and charge the losses to advertizing because the practice lures people down to a grossly expensive store where the crowds can be overcharged on other lines of goods.

Defendant claims that plaintiffs and thousands of regular California dealers attempt, under legislative sanction, to fasten a concededly fair and reasonable price on defendant, but the stark fact is that defendant seeks by his individual act and for a grossly selfish purpose, to fix an unreasonable and unfair price on plaintiffs and their fair and regular dealers.

Plaintiffs deny there is any price-fixing involved in this because their contract price must be fixed in a highly competitive market by

(1) the consumer who does not have to buy an over-priced article;

(2) the dealers who do not have to handle

(3) the producer who is looking for the price of greatest return which usually means wide distribution at reasonable prices and

(4) competitive producers of both branded and unbranded goods who are always ready to undersell an over-priced article.

But if there is price-fixing involved, then the defendant seeks to fix his price on identically the same article on the shelves of all dealers at the same time in the same market. Defendant cannot have it both ways. If it is fair for defendant to have an individual right to mark down or fix a ruinous price on goods owned by thousands of dealers in the same market, it cannot be unfair for the legislature to authorize such dealers to impose *a concededly fair, reasonable* and *competitive* price on defendant.

4. Because the law of market price or fungibility decrees that there can be only one price for the same thing in the same market at the same time, and because, when that one and only price for an article whose fungibility or family relationship to its fellows, is attested by a trademark, is fixed by individual whim, that one price goes down to an uneconomic or unprofitable level gravely injurious to producer and dealer alike (and therefore injurious in the long run to the public), producers and dealers alike have worked out and adopted various concededly lawful systems for preventing any articles bearing a certain trademark from falling into the hands of price-cutters. Make no mistake. The several expensive and cumbersome legal devices for effectively establishing standard prices on trademarked commodities are *lawful boycott devices.*

They are plans by which producers and dealers lawfully cooperate to prevent price-cutters from securing the trademarked article in any practical way. The producer deals only with regular distributors or wholesalers who in turn agree to deal only with regular and authorized dealers who in turn must deal only with the public (*U. S.* v. *General Electric Co.*, 272 U. S. 476, 71 L. Ed. 362). If price-cutters could secure the goods for resale at cut-prices, the whole plan would be vitiated—made worse than useless—converted into a hideous and absurd expense with its one and only purpose and object frustrated by those at whom it is aimed.

5. Retail and wholesale price stabilization of either trademarked or unbranded commodities, whether or not they are in fair and open competition with similar commodities of other producers, is lawful and not regarded as unlawful "price-fixing" or as an unreasonable combination in restraint of trade or as an unlawful boycotting of price-cutters, or as a violation of either the letter or spirit of the rule against alienation, when effected:

a. by combining wholesalers and retailers as agents of a common principal and not passing title to the commodities until the final sale to a consumer.

Miles v. *Park, supra;*
U. S. v. *Gen. Electric, supra.*

b. by establishing chains of stores or service stations. *U. S.* v. *American Tobacco Co.*, 221 U. S. 106, in which the legality of United Cigar Stores Company, as a chain organization, was recognized. Trademarked shoe manufacturers use chain stores to standardize the prices on their special brands of shoes.

c. by establishing wholesale depots, producer-owned, in all large markets and keeping retailers on a

hand-to-mouth basis whereby any retailer who cuts a price today can secure no more supplies tomorrow.

U. S. v. *Colgate,* 250 U. S. 300.

This plan clearly involves a projection of the control of the producer over articles sold to and owned by another. The dealer-owner is effectively restrained from selling the articles he owns at any price he pleases because he knows that if he does so he will be at once cut off from getting any new supplies of the same trademarked article. The title has passed but the producer's control continues in a completely effective way.

6. Retail and wholesale price stabilization established by vertical resale price contracts, protected, under the law, against nullification by strangers, and limited to trademarked commodities which are in free and open competition with similar branded and unbranded commodities of other producers, is less oppressive to the public, more open to use by small producers with capital too limited to continue to own their goods throughout wholesale and retail distribution, and more protective of single store or small retailers, than are the lawful methods of price-stabilization based on agency, consignment, refusal of sale or chain outlet devices. Such resale price protection based on protected vertical contracts does not constitute unlawful price-fixing or contracts in unreasonable restraint of trade, any more than the combining of thousands of retailers as consignment agents of a common principal constitutes an unlawful boycott or combination in restraint of trade to fix prices.

7. The contrary conclusion reached in *Miles* v. *Park, supra,* namely, that vertical contracts, in interstate commerce, with title passing and future sales restricted, are

contracts in restraint of trade but that vertical agency combines to attain the same result in a more expensive and oppressive way, are not boycotts or *combinations in restraint of trade*, is based (a) on a misconception of the rule against alienation and (b) on a failure to realize that trade-marked goods are a very special kind of fungible or family-relationship property in which certain obligations and rights of the producer run with the goods and are inalienable wherefore such goods can lawfully be alienated subject to state-protected contracts setting up price restrictions on future sales.

8. Price maintenance on branded products is either good or bad, *per se*. If it is good, it is just as good when based on contracts protected against unfair competition, as on boycott combinations of consignment agents, and vice versa.

9. The direct economic consequences of the Miles-Park, General Electric and Colgate rules holding that price maintenance by vertical resale contracts with passage of title is bad, but that price maintenance based on the boycotting of price-cutters by means of vertical combinations of consignment agents without passage of title or on refusal of further sales after passage of title, is good, have been appalling and disastrous.

10. Agency and refusal-of-sales combinations unchecked by the competition of vertical resale protected contract systems, have converted a political economy formerly characterized by small capital producers, single unit wholesalers and one store retailers into a regimented economy of chain organizations and holding companies pyramided on chains of chains.

11. Not since the Dred Scott decision have such amazing, contrary, uncalculated and undesired results flowed from a judgment of this court as have resulted from the Miles-Park rule. If that rule is to stand as embalmed in the 14th Amendment and to be imposed upon the intrastate commerce of California and other states by vitiating either the resale contracts or Section 1½ of the Act in question, it can conservatively be predicted that the economic regimentation of the country will be completed within a few years.

12. The United States must take its position either for or against price-maintenance on branded goods, however effected, and whether in interstate or intrastate commerce. Any middle ground will soon make a national economy pivoted on competition a thing of the past. A house divided against itself cannot stand—and a judicial policy that permits plutocratic forms of price maintenance when based on a refusal of further sales after title has passed or on a combination of thousands of consignment agents, stores, service stations or sales branches without transfer of title, but that prohibits democratic forms of price maintenance based on vertical resale price contracts with transfer of title and protection against nullification by strangers, will go down in history as the worst restraint of trade that has ever fastened itself on a modern nation, and the fact that this judicial restraint of trade comes from wrongfully classifying fungible or family-type trademarked goods under the rule regulating alienation instead of under the exception to the rule, as all other modern nations except Canada have done, will not mitigate the already appallingly serious consequence of the mistaken policy.

13. California, like Washington and other states, refused to follow the Miles-Park Rule, and its legislature has specifically recognized price-maintenance based on vertical resale price contracts protected against nullification by strangers as being just as lawful as when effected by boycott combinations of consignment agencies, chains or the like or by placing a servitude on goods already sold by refusal of further supplies if prices are cut.

14. Price maintenance limited to trademarked goods which are in competition with similar commodities produced by others under different trademarks or in bulk, having always been lawful in California and being now specifically legalized when based on contract, it is a mere exercise of the police power to declare that the same distinctively branded or trademarked goods in the channels of trade are subject to the servitude of such lawful contracts when held by strangers who do not wish to close out the line.

15. The legislation is within the power of the state, reasonably shaped to the end in view, not arbitrary, discriminatory or capricious and in every way in the public interest.

16. The principles of ownership and of free-contract should be restored to a parity under the Sherman Anti-Trust Act (U. S. C. Title 15, Sec. 1, July 2, 1890, c. 647, Sec. 1, 26 Stat. 209).

If producers and dealers can lawfully combine under the forms of ownership, holding company, agency or refusal of sales to standardize retail prices on trademarked goods (as they admittedly can), then the same producers and dealers should be able lawfully to accomplish the same result

by resale price contracts protected against the unfair competition of price-cutters.

To widen or liberalize the meaning of the term "combination" in restraint of trade in the Sherman Anti-Trust Act (*supra*), so as to adjudge that the vast congerie of mines, railroads, steamship lines, blast furnaces, rolling mills, distributing agencies and other devices for controlling all prices from the Mesaba Range to the final consumer all under the plutocratic control or ownership of the United States Steel Corporation, *is not a combination in restraint of trade* (*U. S.* v. *U. S. Steel Corporation*, 251 U. S. 417, 64 L. Ed. 343), but that the system or vertical resale price contracts between the comparatively small Dr. Miles Medicine Company and its otherwise independent wholesalers and retailers were *contracts in restraint of trade* (*Dr. Miles Medicine Co.* v. *John D. Parks & Sons, supra*) is:

a. to decree that chain stores, catalog houses and other price-cutters shall grow apace at the expense of small independent dealers who pay local taxes,

b. to force large capital producers to adopt autocratic, maximum capital schemes for keeping their goods out of the hands of price-cutters.

c. To reduce the Sherman Anti-Trust Act to a legal monstrosity as a breeder rather than a destroyer of trusts and restraints of trade.

The Great Atlantic and Pacific Tea Company, better known as the A. & P. Company, is the largest chain of grocery stores in the world.

A. & P. did more business in 1934 than the Ford Company, Sears Roebuck, Montgomery Ward, and the James Cash Penney stores combined. Its total trade was $819,616,727.

A. & P. has 90,000 employees, operates 16,000 stores, 52 warehouses, 39 produce, 12 meat, 5 fish, and 3 but-

ter plants, 40 bakeries, 6 salmon canneries, 9 milk plants, 9 general factories, 8 coffee-roasting plants, one printing plant and a fleet of fishing boats.

A. & P. is not a "combination" in restraint of trade, but resale contracts between the Dr. Miles Medicine Company and its independent distributors are unlawful "contracts" in restraint of trade!

These two results simply do not make sense. If the Miles-Park contracts are unlawful, but the Steel Corporation, the General Electric boycott combine and the A. & P. Company are not unlawful combinations, then the Sherman Anti-Trust Act has become the father of trusts, the most prolific breeder of combinations and restraints of trade that any modern nation ever enacted.

17. To place contract rights back on a parity with ownership, consignment, agency or refusal of sales rights under the Sherman Anti-Trust Act and the 14th Amendment, by recognizing that trademarked goods are in fact and in law a very special kind of property constituting an exception to the rule against alienation and thus capable of transfer alike in *interstate* and intrastate commerce in California under vertical contracts subject to automatic close-out, damaged goods and Court order sales, such contracts to be protected against the unfair competition of price-cutters, (a) would be an act of simple and much needed justice; (b) would restore the Sherman Anti-Trust Act to its real function as a foe rather than a breeder of trusts and restraints, (c) would once more place the monopolistic weapon of unfair price-cutting back where it belongs as a thing condemned rather than protected by the Sherman Anti-Trust Act and the 14th Amendment and (d) would once more place small producers and small distributors with their protected contract rights on a competitive parity with large producers with their destructive twin weapons of plutocratic and autocratic sys-

tems of price-protection and their monopolistic weapon of predatory price-cutting.

18. In all important foreign countries, except Canada, price maintenance on trademarked articles is just as lawful and good when based on protected contracts as it is when effected by agencies, consignment, or refusal of sales devices.

19. Price-cutting has been outlawed as applied to many similar forms of fungible goods and services in the United States, such as postage-stamps, railroad tickets, newspapers, magazines, insurance policies, stock exchange and other forms of brokerage, etc., without restraining trade or eliminating competition.

20. Section 1½ is the heart of the Act. If that be killed, the Act dies with it.

21. California has power and right, through the Act in question, to place price protection of trademarked commodities, based on resale price contracts guarded against unfair nullification by price-cutters, on a parity with price-protection based on boycott or consignment combines and refusal of further sales devices.

22. The system of vertical resale price contracts relating to plaintiffs' trademarked products and protected against the unfair competition of price-cutters is not prohibited by the 14th Amendment to the Federal Constitution and is lawful both in interstate and in intrastate commerce in California and was lawful both before and after the passage of the California Fair Trade Act, the reasoning of this Court in *Miles* v. *Parks, supra,* to the contrary notwithstanding in so far as that reasoning might influence or affect either intrastate or interstate commerce in California.

ARGUMENT.

The demurrer concedes that defendants' cut-rate practices will force plaintiffs' dealers to cancel the contracts to the injury of plaintiffs and their dealers.

If the contracts are lawful, the 14th Federal Amendment guarantees to plaintiffs and their dealers the right to enjoy the fruits of these lawful contracts and both the legislative and the judicial power of California may be invoked to protect these contracts against nullification by strangers or others acting to bring about a cancellation or nullification of the contracts.

> *Bitterman* v. *Louisville & N. R. Co.*, 207 U. S. 205, 52 L. Ed. 171, 21 Sup. Ct. 91;
>
> *Angle* v. *Chicago, S. P. and M. R. Co.*, 151 U. S. 1, 35 L. Ed. 55, 14 Sup. Ct. 240, and authorities cited in both these cases.

Assuredly the legislative and judicial power of California can be invoked to deprive the public of the transient if not illusory advantage of price-cuts on some well known or "loss-leader" items currently attended by overly-high prices on items of unknown value, especially where that practice, like other forms of monopolistic or unfair price-cutting, tends to eliminate small or independent dealers and in the long run to oppress the public by forcing it to deal with expensive and monopolistic chain organizations and the like. The legalization and protection of the contracts in issue is a proper and non-discriminatory means to the end in view.

This court in the two cases above cited deprived the public of bargain rates on tickets because such rates were imme-

diately injurious to the railroads and, in the long run, to the public. The tickets were fungible or family-type products controlled by the law of market price. Either the scalpers would mark down the price to an unfair level or the railroads had to be protected in marking up the price to a fair level.

Regular retailers operating under lawful contracts which establish admittedly reasonable prices on trademarked goods, are just as deserving of protection under ordinary judicial, legislative and police powers as are the railroads. At least there is nothing in the 14th Federal Amendment which prohibits California from extending such protection to lawful contracts.

It is thought that on the basis of the legality of the resale price contracts in issue, there can be no question as to the power of California to protect them as property or rights the enjoyment of which is guaranteed to plaintiffs and their dealers by the very 14th Federal Amendment on which defendant seeks to base his privilege of destroying or nullifying such lawful rights.

But, if it should be thought that the real question is not so much as to the power of California to protect legal contracts, but whether or not the contracts really are lawful and in the public interest and worthy of protection, we submit that a candid study of the reason, purpose and effect of the contracts shows that in intrastate and interstate commerce alike the contracts are in the public interest and failure to protect them against unfair competition would be against the public interest.

In short, the ruling in *Miles* v. *Park, supra,* was just as much against the public interest as though the Court in the *Bitterman* or *Ticket Scalper's* case, *supra,* had decided that the public was entitled to the benefit of cut-rate com-

petition in railroad tickets, or even had made a ruling that the contracts are lawful but that the cut-raters could not be enjoined from nullifying them!

Trademarked or branded goods produced by the trademark proprietor and sold by dealers on his name, reputation and good-will in competition with commodities of the same class produced by others are and have long been regarded as a very special kind of property as to which the good-will and reputation of the producer inalienably run with the goods and to whom there is a constant possibility of reverter for defects, repairs or new supplies and by whom the goods are impliedly or expressly guaranteed. Such goods therefore in California have always been treated as an exception to the common law rule against alienation and susceptible to transfer under reasonable vertical price restrictions without violation of the rules or statutes against alienation and unreasonable restraints. *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745, and *Ghirardelli* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041.

Price maintenance on such special or trademarked fungibles is not unlawful *per se* even in interstate commerce but only when title to the goods is passed. The emphasis on the commercially unimportant rule against alienation or transfer of title has freed the goods but enslaved the formerly free dealers by making them into plutocratically and autocratically regimented agents selling branded goods at controlled if not

manipulated prices, all to the gross injury of trade and oppression of the public. This is the evil with which the legislature dealt in the Act in issue.

If the resale price contracts are valid, it does not seem to us that the question of protecting them against nullification by strangers presents much difficulty of solution. If California may lawfully recognize the contracts as valid, it may certainly protect them. The real issue concerns the validity of the reasons for treating the contracts as valid.

The special nature of trademarked or branded goods is dramatically emphasized by the almost incredible transformation in methods of doing business which has occurred as a result of the decision of this court in the case of *Dr. Miles Medical Co.* v. *John D. Park & Sons Co., supra,* which in effect held that retail price stabilization on trademarked or branded goods like Dr. Miles Medicines, was bad and unlawful if title passed, but good and lawful if title did not pass from producer to dealer; in short, that vertical contracts between the Miles Company and twenty-one thousand wholesale and retail dealers were in unreasonable restraint of trade when title to the goods was transferred in violation of the rule against alienation, but that, if title to the goods did not pass, the Miles Company could lawfully combine the same twenty-one thousand dealers into a vast consignment agency device under the autocratic control of the Dr. Miles Medicine Company to accomplish identically the same result by preventing price-cutters from securing supplies, in a manner much more expensive and oppressive both to the trade and to the public.

That judgment strained at the gnat of vertical price contracts on a branded product while swallowing the camel of vertical combination of the same group of thousands of wholesalers and retailers accomplishing precisely the same result of standardized prices for the Dr. Miles Medicines sold in competition with the remedies of Father John and other medicine companies.

The implications of the decision in *Miles* v. *Park* were followed out in *U. S.* v. *American Tobacco Company, supra,* in which the chain-store device represented by American Cigar Stores Company was recognized as legal. The policy was further expanded in *U. S.* v. *Colgate* (250 U. S. 300, 63 L. Ed. 992, 39 Sup. Ct. R. 465), in which horizontal price stabilization at wholesale and retail was recognized as legal when maintained on the Colgate branded products by refusal to sell the goods to price-cutters. Control over goods already sold was projected by the policy of refusing to sell new supplies if prices were cut on old supplies.

The *Miles-Park* decision was finally capped by the judgment in *U. S.* v. *General Electric, supra,* which specifically recognized the legality of a nation-wide combination of twenty-one thousand sales agents representing a common principal and charging dictated prices on Mazda lamps, the central purpose of the plan being to prevent any Mazda lamps from getting into the hands of price-cutters or other unauthorized dealers.

This almost incredible legal conclusion, namely, that price maintenance on branded goods, when based on refusals of sales, combinations of agents or chain-store devices, was legal both as applied to branded goods and unbranded goods, but that identically the same result was bad when accomplished by vertical contracts limited to branded goods in competition with other similar goods, grew out of an

undue emphasis laid on the old common law rule against alienation and of failure to recognize that branded goods fell under the exception rather than the rule.

It is safe to say that Lord Coke would have recognized, as the English judges since his day have unhesitatingly recognized, that an Ingersoll watch or a Ford automobile is a very special kind of a property to which the name, reputation and good will of the original producer are inalienably attached, running with the goods down to the final consumption of the product, with a constant "possibility of reverter" growing out of the fact that the trademark owner is praised for quality, blamed for defects, looked to for repair, spare parts or replacements and finally depended upon by both trade and consumer as the real promoter of sales and energizer of trade.

Since the *Miles-Park* judgment, a disquieting transformation has occurred in trade conditions within the United States, and in California, without any comparable parallel in other countries which regard trademarked goods as falling within the exception to the rule against alienation.

Three Competing Systems.

Before the *Miles* v. *Park* decision, there were three distinctly recognizable and highly competitive systems of marketing goods in this country, and all three of these competing systems operated through the medium of independent wholesalers and independent retailers.

1. The Unbranded System.

So-called bulk, loose or unbranded goods are things which are anonymously produced. No one cares whether

they come from one producer or another. Being unbranded or maverick goods, they must be sold on the reputation of the retailer who, if legitimate, advertizes himself, his integrity and his store rather than a particular product, its source of origin and the integrity of its producer. The public does not know the producer of bulk or unbranded goods. There are no price restrictions and no marks of origin. Differences in retail price are supposed to be caused by variations in inherent value. Such goods are ineffective as "loss-leaders" because there is no trademark to establish a standard of value and fungibility. The unbranded goods are sold by so-called "local", store or dealer advertizing rather than by "national", "product" or producer advertizing. Dealer advertizing usually goes into the local papers; product or producer advertizing usually goes into the national magazines and the like.

2. The Agency or Consignment System.

This system of merchandising is not confined to either branded goods or to bulk goods. The producer or manufacturer consigns the goods to wholesaler or retailer, retaining title in himself until the final sale to the public. This consignment system is largely devoted to new and untried articles which require expensive educational processes to introduce to the market. Wholesalers and retailers are unwilling to invest capital in these new goods of uncertain selling qualities. Therefore the producer assumes the risk by placing the goods on consignment with the trade and by allowing the dealers long profits to compensate them for their trouble in working up sales and educating the public in the use of the new razor, massage device or what not.

3. The Trademarked, Branded or Vertical Contract System.

After the trade and the public became educated in the use of new devices initially marketed under the consignment plan and when the devices were widely distributed so as to justify advertising in a national way, it was much cheaper for producer, wholesaler, retailer and the public to dispense with the consignment system and market the goods under the vertical resale contract system, relying on the producer's advertizing and reputation as the principal energizer of sales, rather than on any special sales effort of the dealer who is a mere neutral broker or agent of the producer in actual sales fact and substance even though he has bought and does own the legal title to the article. The dealer's function in selling an article which carries its producers' name and has his advertizing instilled into it to make it self-selling, is more like the function of a postman delivering a letter than a retailer working up or creating a sale on his own reputation as a retailer of integrity.

The manufacturer under the contract system of price-protection only had to have enough capital for his daily, weekly or monthly turnover. His capital was immediately replenished by selling his output to the wholesalers or jobbers who acquired title under agreements which restricted them to sell to retailers at uniform wholesale prices under contracts limiting the retailers to uniform and usually advertized prices to the public.

So long as branded articles are protected against competition by letters patent, their prices are based on the competition of conflicting desires. If a certain type of patented razor is regarded as overpriced at $5.00, the public will purchase a different make at $1.00, or at $2.00, or at 50¢.

As soon as patents expire on the popular types, the ordinary law of market competition begins to regulate the retail price. If the original patentee tries to hold his price too high, other producers will make the same article under different trademarks at lower prices. In the very week during which the patent on a well known type of razor expired the price fell away from $5.00 to below $1.00.

Competition Within and Between Systems.

As before stated, these three systems were operated concurrently through independent wholesalers and retailers. Some goods flowed anonymously at free prices from producer and wholesaler to retailer and public. If different dealers charged different prices the public assumed it was because of different qualities. There was no criterion of value. The same wholesalers and retailers were simultaneously handling other goods on a consignment or agency basis. At the same time these dealers were handling branded or trademarked goods on vertical resale price contracts.

If branded or consignment goods tended to be too high in price, the public turned to loose, bulk or unbranded goods backed by the integrity of the dealer, the producer being unknown. If consignment or agency goods sold under trademark were too expensive, the public turned to the next competitive article sold under the less expensive contract system. Competition between different brands under the vertical contract system was very keen because it was directly between producer and producer. The independent wholesaler and retailer were neutral channels of distribution, like post offices. They carried all makes of goods under different trademarks and under different prices.

Witness the tremendous price reductions and economies that have gone to the public through the expert but price-controlled competition between different producers of motor cars in past years. Rigid price-maintenance intensified rather than reduced the real competition between producers each controlling the price on his own trademarked car.

As to branded goods in the lower price levels, the competition was of the showcase or display shelf variety. A customer walked up to a counter and there on display was an entire line of razors from every important factory in the world, each distinguished by its own brand or trademark. There also were other standard makes of cutlery that were unbranded. Each producer was controlling his own trademarked products like regimented soldiers. If one make of article was overpriced at $5.00, customers turned to one just as good at $4.00, or if someone could make a satisfactory article at $1.00, all of his competitors had to meet that price or lose business.

Perhaps the outstanding example of the operation of the branded or vertical price contract system was the Ingersoll watch. The first watch cost approximately $52,000.00 to produce. The retail price was regulated by the ability of the producer to distribute the goods inexpensively throughout the country. So long as the total demand equalled only a few thousand watches per day, the goods could not be produced to sell at less than $5.00 or more per watch, but eventually the manufacturer increased his good-will and his distribution to the point where through the branding of the watch as an Ingersoll Dollar Watch and by having practically 100% distribution throughout the retail trade and by prominently advertising the Ingersoll name and the Dollar price until one was synonymous with the other, sales resistance was so completely broken down that it was pos-

sible to market many thousands of watches per day and thereby to sell this $52,000.00 watch at a One Dollar price, which included a fair profit for the producer, the wholesaler and the retailer, and which was also fair to the consumer because no competitive producer could better it.

This whole system pivoted on the sanctity of the vertical price contract. If any dealer could lawfully cut the price of $1.00, he would thereby mark down the retail price not only on his own stock but also on the stock of all other retailers in that market at that time, thus demoralizing the whole system, because other dealers who could only make a fair profit at the $1.00 price, would then put the goods under the counter and tell customers who expected to buy them at the cut price that they had none in stock. The dealer preferred this course to quarreling with the customer who expected to purchase a $1.00 article at a cut price.

These three smoothly working systems of merchandising, with competition operating between the three systems and also within each of the three systems, and all three systems working through independent competing wholesalers and retailers is still in existence in every important country in the world excepting only the United States and to a lesser extent in Canada.

The three competing systems do not work toward monopoly or the creation of chain stores, catalogue houses, price scapers and the like, but tend always to preserve the independence of one-store merchants.

These three systems were in existence and operating smoothly throughout the United States until around the turn of the present century.

Patent Infringement Price Systems.

New and high-priced patented goods could always lawfully use the consignment or agency system of maintaining prices, but the excessive burdens and expenses of that system, consequent upon the producer having to furnish not only manufacturing capital but jobbing, wholesaling and retailing capital as well, forced the producers of new and patented specialties, around the latter part of the last century, to stamp the retail prices on their goods and to pass title subject to restrictions which purported to convert price-cutters into infringers of the patent. The lower federal courts upheld the legality of these retail price systems based on patents in a series of cases.

There was nothing pernicious about this patent price system. It was inexpensive and abuses were prevented by competition between rival makers of patented articles or the competition of conflicting desires. The very success of the Gillette Safety Razor Company in holding the $5.00 price on its patented razors brought in a flood of competitive razors at every price range from $5.00 down to 25¢ for a very good razor made by Mark Cross of London.

The principal effect of a refusal by the courts to enforce this patent price system was to force the same articles onto a consignment or agency system with an added burden of expense falling ultimately on the public.

The Copyright Price Case.

The success of the patent infringement price system in the lower Federal courts aroused the emulation of publishers. Bobbs-Merrill Company published a book called "The Castaway" containing a notice that anyone who sold it at retail for less than $1.00 would be held as an

infringer of the copyright. The Constitution prohibits cruel and unusual punishments, and the defense of an infringement suit is an onerous thing.

The *Bobbs-Merrill* case came to this court (*Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086) which held in effect that the price-cutter was not a copyright infringer. The most astonishing thing about the decision was that this court referred to the fact, without either comment or condemnation, that R. H. Macy & Company was buying the "Castaway" in the open market at $1.00 per copy for the purpose of re-selling it at 89¢ a copy, a clear loss of 11¢ per copy on the purchase price, to say nothing of the approximately 30 or 35% overhead cost which represented a pure loss to R. H. Macy & Company in carrying out the expensive transaction.

It is safe to say that the old Oil Trust in its most predatory days never purchased oil at $1.00 a barrel for the purpose of selling it at 89¢ a barrel to injure its little competitors. It relied mostly on railroad rebates.

Secret Formula Price Protection.

Then came the crucial case of *Dr. Miles Medicine Company against John D. Park & Sons* (220 U. S. 373, previously referred to). The majority and the dissenting opinions in that case show that the argument at bar was principally concerned with establishing that the Dr. Miles branded or trademarked product in issue was made under a secret formula which was like unto a patent and thereby gave the producer the right to restrict the retail price on some sort of an infringement theory of projection of monopoly.

The court disposed of that argument pretty much as it

did the copyright argument in the *Bobbs-Merrill* case and of the patent infringement theory in later cases. (*Bauer* v. *O'Donnell,* 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041; *Straus* v. *Victor Talking Machine Co.,* 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 886; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.,* 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871; *Boston Store of Chicago* v. *American Graphophone Co., et al.,* 246 U. S. 8, 38 Sup. Ct. 257.)

Trademark Price Protection is Either Good per se or Bad per se. There is no tenable middle ground.

Grave economic maladjustment flowed from this epoch-making case of *Miles* vs. *Park* due to the fact that this court recognized the validity, under the Sherman Anti-Trust Act, of the combination-consignment, agency or boycott system of standardizing retail prices but condemned the resale price contract system and refused to protect it by injunction.

It is earnestly submitted that wholesale and retail price standardization on branded or trademarked articles is either good or it is bad. If it is good, it is good whether it is established by vertical price contracts or by consignment, agency or boycott combines or by setting up wholesale depots for feeding the retailers from hand to mouth so as to maintain prices by cutting off the supplies of price-cutters. (*U. S.* v. *Colgate,* 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992; *U. S.* v. *A. S. Schrader's Son, Inc.,* 252 U. S. 85, 64 L. Ed. 471; *Frey & Son* v. *Cudahy Packing Co.,* 256 U. S. 208, 65 L. Ed. 892; *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 66 L. Ed. 307.)

On the other hand, if retail price standardization on branded or trademarked goods is bad *per se,* then it is just

as bad when established by a boycott combination of consignment agents as by a system of vertical contracts. The result is the same so far as the public is concerned except that the agency systems are more expensive than the vertical contract systems.

The Sherman Act condemns both contracts and combinations in unreasonable restraint of trade. It makes no distinction as to whether the restraint is effected by combining together twenty-one thousand wholesalers and retailers as consignment agents of a common principal or by combining the twenty-one thousand dealers by means of vertical contracts.

The importance of the rule against alienation, as a trade fact, is truly chimerical so far as special fungibles like trademarked commodities is concerned. The public seldom knows whether title has passed from producer to dealer or not, and cares even less. The consignment system is much more cumbersome and monopolistic than the contract system and the public foots the bill.

The only difference between the contract, the consignment and the refusal of sales systems is wholly in favor of the contract system. The vertical contract combination can only be effected on goods which are branded or identified as coming from a common source by bearing a unique trademark. This vertical contract system is inexpensive, rides lightly on the pocketbook of the public, is highly competitive and invites little producers to operate because they only have to control manufacturing and advertizing capital and do not have to supply the vast amounts of capital required for consigning the goods to twenty-one thousand dealers with retention of title.

This good system of standardizing retail prices on

trademarked commodities by vertical contracts was condemned by this court in the *Miles-Park* case.

But the same court in the same case recognized the unquestioned legality of the system of maintaining retail prices *on either branded goods or unbranded goods* by a vast combination of agents on a consignment basis or by the use of chain store outlets, such as the shoe manufacturers, oil companies, and the like, employ.

The Effects of the Miles v. Park Case.

The direct and unavoidable result of the decision in the *Miles* v. *Park* case was that large manufacturers with sufficient amounts of capital to establish their own chains of stores, agencies or service stations or to consign their goods to thousands of retailers, took steps lawfully to protect the retail prices on their branded and unbranded goods by boycotting or withholding supplies from price-cutters through combinations of many thousands of selected dealers, but the little producers who were without sufficient capital for consignment purposes had to sell out or merge with large concerns or else have their sales cut down and their business injured by price-cutting.

The independence of the wholesalers was likewise affected by the *Miles* v. *Park* decision. Some of the big manufacturers took over the wholesale functions on their goods. The great collar and shirt manufacturers established wholesale depots in all of the principal retail markets, thus injuring the independent wholesalers and enabling the manufacturers to feed the retailers on a hand-to-mouth basis, so that anyone who cut prices today could get no more goods tomorrow.

The effect on the independent retailers was the most

disastrous of all, because the very forms of monopolistic or below-cost price-cutting which were condemned in the oil cases were legalized and approved in the *Miles-Park* case, and this thus legalized form of price-cutting has been just as disastrous to the independent retailer as it formerly was to the independent oil operator.

Miles v. *Park* started the country into a process of economic regimentation which, unless checked, must finally evolve into state socialism or something worse.

The effect on the public was bad, not only because merchandising gravitated to chain stores and metropolitan centers, but because the cost of doing business rose sharply, and the public had to foot the bill.

Combination Price-Cutting is Bad in All Its Forms.

Price Manipulation.

This court, in *Standard Oil Co.* v. *U. S.* (221 U. S. 1), severely and properly condemned the practice of the Oil Trust in selling oil low in competitive territories and high in non-competitive. That was recognized as price trickery or combination price-cutting. The Trust could only sell oil low in the "fighting" territory because that territory was combined in ownership with other territory in which the Trust was charging too much due to a condition of previously achieved monopoly. The small independents, having no combination of high price monopolized markets to counterbalance their losses in low price competitive markets, soon were forced to the wall. This might be regarded as checkerboard price-cutting.

A chain store is merely a checkerboard of markets drawn out into a chain under one ownership, not different in prin-

ciple from the checkerboarded markets of the Oil Trust. A chain system can convert first one store and then another into a "fighting store" to "meet local competition" and the nearby independents soon fold up because they have no distant stores in non-competitive territory from which to draw monopolistic profits to carry them through a price war in the competitive territory.

A department store is merely a chain of stores located under one roof, each handling a different kind of goods. A department store is admirably adapted for the same type of combination price-cutting which created the Oil Trust and the predatory chains. The department store successively eliminates its various one-store competitors in price wars. The china department, for example, is converted into a "fighting" department "to meet competition". Losses in the chinaware department are offset by profits from departments which have previously met and eliminated their local competitors. Single unit stores specializing in chinaware, having no other departments to offset their losses on chinaware, are soon eliminated.

Single unit price-cutting stores depend on their ability to play certain loss-leader-lines against higher priced lines of other goods. Bargain hunters are drawn into the city or downtown by flaming headlines and radio appeals. Then high-powered salesmen manage to sell them as little of the loss-leader goods and as much of the long-profit goods as possible. It's all very expensive merchandising but the public foots the bills and thinks it is being economical.

"Economies" Which Increase the Cost of Doing Business!

During the orgy of combination price-cutting which was legalized and stamped with judicial approval by the judgment of this court in *Miles* v. *Park, supra,* the cost of doing

business has steadily mounted from around 10% to around 30% of gross sales.

Price-Cutting Frequently Condemned.

Price-cutting on oil was condemned in *U. S.* v. *Standard Oil Co., supra.*

Price-cutting on railroad tickets was similarly banned in *Bitterman* v. *L. & N. R. Co., supra.*

Price-cutting was eliminated, in so far as refusal to sell goods to the price-cutters could eliminate it, by the judgment of this court in *U. S.* v. *Colgate, supra.*

Price maintenance effected by a chain of stores was legalized in *U. S.* v. *American Tobacco Co., supra,* by recognizing the United Cigar Stores Company as a lawful chain store device.

Price-cutting on Mazda lamps was eliminated by the judgment of the court in *U. S.* v. *General Electric, supra,* which upheld the legality of the consignment system of combining many thousands of dealers as agents of a common principal in order to refuse supplies to price-cutters.

This long line of wise decisions (a) against the practices of predatory price-cutting on oil by a combination of monopolized and fighting markets, (b) of protecting railroads against the impossible ordeal of trying to sell transportation at a high price when scalpers were offering the same transportation in the same market at a low price, (c) assisting those collar and shirt and other producers who were financially large enough to project their control over goods already sold by establishing their own local wholesale depots and thus keeping their dealers on a hand-to-mouth basis to prevent price-cutting by refusing supplies to the price-cutters or anyone who tried to supply them, and (d)

legalizing the enormous combination of sales agents by which the General Electric Company prevents all price-cutting on its Mazda lamps (both (c) and (d) constituting Ulysses' bows which small capital producers could neither hold nor bend), is only marred by the judgment of the court in *Miles* v. *Park, supra,* which, in effect, legalized and approved the principle of price maintenance on branded goods when erected and maintained by a maximum capital boycott combination of agents bound to a common principal, so that no title to the goods passed until the final sale to the public (*i. e.,* the General Electric Mazda Lamp plan) but legalized and approved the practice of loss-leader or combination price-cutting by refusing to approve the small producer's and small dealer's minimum capital device, namely, the vertical resale price contract which is legalized and protected in the California Act here in question.

Price-Cutting Chain Organizations Grew Apace.

For a few years after the decision of the Court in *Miles* v. *Park, supra,* national manufacturers of trademarked goods whose products were handled in approximately 100% of the retail stores and who thus could not select a mere twenty-one thousand or so elite agents for a consignment or boycott system of retail price protection, endeavored to combat the chains by serving as champions in the movement to have the Federal Congress remove the barrier which this Court had raised against the vertical resale price contract system in the *Miles-Park case.* No one has ever claimed that it would require a Constitutional Amendment to remove that barrier. The amazing and disastrous results which have flowed from it, show that the barrier ought never to have been raised at all—at least unless all forms of price-maintenance were to be equally condemned.

The chain stores and the other combination price-cutters grew so fast and large under their privilege of legalized combination price-cutting that they drove many independent stores to the wall and reopened them as chain units. They so hypnotized the public into the belief that the high-priced stores were selling goods cheaper downtown than their little competitors uptown or out in the country could do that the producer champions of the contract-price-system soon faded quietly into the background and later began to curry favor with the big chain store systems by making them advertising, quantity discount and other allowances which in effect gave preferential discounts or secret rebates to the big chains and price-cutters as against the little one-store dealers.

In short, national producers who could not protect their trademarked lines from price-cutting by using consignment systems, chain outlets or refusal of sales devices found themselves selling the chain store systems at prices too low and averaging up their gross receipts by selling the little independent dealers at prices too high.

Maximum Capital Economics.

This differential in purchasing power gave the big chains a further margin of profit to be passed on to the public in further cuts on loss-leader and other lines to hasten the elimination of the small dealers by the big combined ones.

The whole scheme—chains grown bloated on legalized price-cutting and increasing their edge over little competitors by grossly unfair discriminations in buying power, due to their vast size, constituted what may be called *a maximum capital economy.* The concern with a large capital could always outreach and undersell the concern with

smaller capital. Big concerns automatically grew bigger. Little concerns tended automatically to grow smaller.

As a system of evolutionary socialism it was fine. As a system of economic democracy it was rotten.

This whole matter of discrimination as between customers deserving of equal treatment by overcharging the little dealers so as to be able secretly to undercharge the big dealers had all been fought out and settled as railroad policy, but it had to be threshed out all over again in private business with the result that the Clayton Act (U. S. C. Title 15, Chap. 1, Sec. 13, Oct. 15, 1914, C. 323, Sec. 2, 38 Stat. 730) was passed to prohibit discrimination in price as between different customers under similar circumstances.

After the Clayton Act had been whittled down by various legal subtleties, the Patman-Robinson Act (An Act to amend Section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes", etc., approved June 19, 1936, U. S. Public Acts 1936, No. 692, 74th Congress, 2nd Session, H. R. 8442) was passed to deprive wealthy distributers of the secret rebates, allowances and discriminations which they had been extorting from producers at the expense of little purchasers because they had waxed so great on the price-cutting practices legalized and approved in *Miles* v. ***Park, supra.***

These developments caused directly by the *Miles-Park* judgment are so contrary to the purpose of the Court and so injurious to producer, dealer and public alike that the Court should take judicial notice of them, or, if they be questioned, they are matters concerning which proof could be supplied if the case be not disposed of by affirmation on demurrer.

Three Legally Forged Weapons for Driving Small Dealers to the Wall.

Here then were three legally forged weapons for eliminating single-store standard-price-retailers and fostering chain stores, consignment combines, refusal-of-sales-systems, and expensive cut-rate department stores, catalog houses, and price-wreckers:

First.—Automobile, lamp, shoe, oil, shirt, collar and other manufacturers and producers with large enough capital resources, cut out the formerly independent wholesalers, retailers and salesmen entirely and established their own autocratically controlled chains of consignment, franchise and sales agencies and refusal of sales systems. This alone caused a devastating change in lines of business formerly open to independent dealers.

Second.—The monopolist's weapon of combination-price-cutting, legalized by the *Miles-Park* ruling in all lines of business where it could not be prevented by the establishment of producer-controlled combines as enumerated above, caused a further elimination of one-store retailers and dealers and a tremendous growth of distributor-controlled chains.

Third.—Sheer size and buying power resulting from predatory use of combination-price-cutting by the chains enabled them to extort discriminations and price concessions from the producers to be used for further price onslaughts against the few remaining small dealers—the whole amazing phenomena having no comparable parallel in countries which permit trademarked price maintenance to be established by legally protected vertical contracts the same as by consignment, agency or refusal of sales devices.

It is earnestly submitted to this honorable court that the result reached in the *Miles-Park* case is untenable in

logic, in law or in public morals, and the trade processes which have been traced show that the principle of permitting price stabilization by expensive agency, consignment, refusal of sales, or chain store, or service station devices, while condemning small producers and independent dealers to the ruthless and destructive effects of price-cutting by refusing to legalize inexpensive resale-price contracts protected against nullification by unfair competition, is practically the largest factor which has upset the economic equilibrium of the country and started us on the maximum capital road to ruin.

If this court shall embalm the *Miles-Park* rule in the 14th Amendment to the Constitution of the United States by declaring against the validity of either the contracts themselves or Section 1½ of the California Act in question, the court will have doomed small producers and dealers to eventual extinction and will have continued to create quasi-trusts (a) by giving wealthy producers powerful agency or ownership weapons of price protection, (b) by giving wealthy distributors and chain stores the monopoly weapon of legalized price-cutting, (c) by encouraging the practice—now unlawful—of secret rebates or (d) of evading the operation of the anti-rebate acts by further combinations of producer and dealer organizations.

The Real Issue.

It is respectfully submitted that the issue presented to this court by the California Fair Trade Act cannot be resolved by recourse to the rule against alienation but must turn on the question whether trademarked price maintenance *per se* is condemned or permitted by the Constitution. If twenty-one thousand Mazda lamp dealers can lawfully

be combined for the sole purpose of preventing a few price-cutters from getting any Mazda goods to sell at cut prices (and this court has held that they can) then nothing in the Federal Constitution can inhibit California from reaching the same result by holding that the same price-cutters can be enjoined as unfair competitors from nullifying a vertical resale price combination of the same twenty-one thousand dealers.

The two methods are both either good or bad. Only economic regimentation or chaos, either or both, can come from endeavoring to hold that one result is good and the other is bad.

Price maintenance on branded fungibles is either good or it is bad. There is no middle ground. It is *per se* either a bad thing, an unlawful restraint of trade, injurious to the public, or else it is a good thing and not prohibited by constitution, statute or common law, and open just as much for the protection of the little producer and publisher by protected contracts as for the big manufacturer and chain store man by regimented agencies.

If price maintenance on branded fungibles is good and in the public interest and not an unreasonable restraint of trade and not an unlawful price-fixing device, then it is just as good when erected on contracts protected against the depredations of strangers as unfair competitors (Secs. 1 and 1½ of the Act in question) as it is when erected on vast maximum capital devices such as refusal of sales, chain agencies and consignments.

The protected contract system is essentially preservative of independent retailers. Destroy the contracts or their protection against nullification by price-cutters and you destroy the independent dealers.

The Three Systems, the Unbranded, the Agency and the Protected Contract Systems, Are Absolutely Essential to a Free Economy.

When a manufacturer puts out a branded or fungible product at an advertised price, he has to take into consideration so many different elements of possible competition, that it is impossible for him to make an unfair price and remain long in business or injure anybody except himself. His price on his special trademarked product must meet five rigid tests. First, it must be such a price as will appeal to the consumer, else the consumer will not buy; second, it must satisfy the distributor, else he will not distribute; third, it must satisfy the manufacturer, else he will not manufacture; fourth, it must be a competitive price so far as all other special brands of goods are concerned, else his competitors will take the business away from him; fifth, it must be a competitive price so far as all unbranded goods are concerned, else the latter goods will sell in its place.

Every price that is made by every manufacturer under these three systems must meet those five tests, and it is a practical impossibility for any manufacturer to remain in business for any length of time if he violates any one of the tests, because any one of those elements can put out of business a manufacturer who insists on an unfair price. The consumer alone can put him out of business by refusing to buy; the distributor alone can put him out of business by refusing to distribute, and in this case the producer's

only recourse would be to hire his own agents; and finally, his competitors under either the branded or the unbranded systems can put him out of business by offering better quality at the same price, or the same quality at a lower price.

Destruction of the Protected Resale Contract System Destroys the Independent Distributor System.

Now, these three competitive and self-checking systems are absolutely dependent for their existence on the enforcement of protected price contracts on special fungible or branded products. If the courts legalize, enforce and protect these contracts there will be three systems. If the courts refuse to enforce these contracts, then in the end there will be only one system, namely, the agency system, and that eventually spells a regimentation which is hardly short of socialism—presenting at least its bad factors without its good.

It is not frequently realized that when the contract system is destroyed, the ultimate doom of the unbranded system is likewise sealed. With these three systems in competition with each other, each different type of goods finally gravitates into that system under which it can be most cheaply distributed. Thus, goods which have been standardized by all makers drift into the unbranded system. Goods which can be sold to the best competitive advantage by the contract system gravitate into that system. Finally, special goods which always require the agency system will fall under that heading.

But when the contract system is struck down, it ultimately carries with it the unbranded system. When the contract system is eliminated, the competitive advantage is thrown in favor of the financially large distributors and the

financially large manufacturers, and when the inevitable result of that competitive advantage, namely, the existence of manufacturers' agencies and of chain stores, occurs, then there is no longer competition either in branded goods or in unbranded goods and these plutocratic distributor's and producer's systems tend to merge. So long as the independence of small retailers is preserved by means of contracts, they can compete with each other in the sale of unbranded or bulk goods and in the selection of different kinds of branded goods, but when the law has forced those independent distributors to become hired agents of great manufacturers or chain-store systems, then there is no longer price competition in either the branded or the unbranded goods. This is a very serious argument in favor of the validity of Section 1½ of the California Act here in question for checking the present alarming tendencies toward vast aggregations of capital for manufacturing and distributing goods, with their tendency to merge. If independent dealers are protected against predatory price-cutting they will continue to exist; otherwise they will be supplanted by various kinds of chain systems.

Just as the destruction of the contract system means the ultimate destruction of the unbranded system, so the enforcement of protected resale price contracts on special fungible products means the existence of the unbranded system, because the contracts leave the independent distributors free to buy and sell different branded and unbranded products in competition with each other.

Surely, if the court in the *Miles-Park* case had realized the full effects of its decision, if it had realized that the destruction of the contract system meant the ultimate destruction of the unbranded (or independent retailer) system, its decision would have followed the line of the minority rather than the majority opinion.

California has elected to retain the three competing systems which depend upon the preservation of free, independent, one-store dealers by means of resale contracts protected against unfair competition. The 14th Federal Amendment does not prohibit this.

California has elected to eliminate those forms of predatory price-cutting which injure or destroy small dealers and which cannot be prevented by setting up lawful but expensive or maximum capital systems of agency, consignment or refusal of sales. In short, small capital producers and small or one-store dealers are permitted to employ the protected contract system, and it is not seen how the 14th Amendment, which concededly does not prohibit the expensive agency, consignment or ownership systems, could possibly prohibit the inexpensive protected contract system.

The Act Relates to Special Fungibles.

Why Price-Protection Is Necessary on Trademarked Goods.

From the earliest times the Roman and other systems of law have recognized the clear distinction between fungibles and non-fungibles.

The Century Dictionary and Encyclopedia defines a fungible as follows:

"Fungible . . . a. and n. . . . .

I.a. Capable of being replaced by another in respect of function, office or use.

II.n. In the Civil Law, a thing of such a nature that it may be replaced by another of equal quantity and quality; a movable which may be estimated by weight, number or measure, as grain or money."

Horses, or cows, of varying individual merits, are examples of non-fungibles. If sold or borrowed, the delivery or return of the particular animal is required, and no substitute would be regarded as fungible or just as good. Such articles can sell at varying prices at the same time because each unit has an individual value.

Fungibles are dealt in by weight, number or measure but non-fungibles are dealt in by individual unit on a sort of *sui generis* basis.

Articles produced under a trademark or brand are by their very nature what may be called *special fungibles.* A new book of a certain edition or a new Ford motor car of a certain year's model and type is precisely fungible to all other new books of that edition or new cars of that model and type. All these Ford cars are as nearly alike as the processes of modern manufacture can make them. A customer chooses his model and type from a sales sample in a show room. He does not expect, without special contract, to receive the car he inspects, but merely another car like or fungible to it. So with Ingersoll watches, Squibb's Aspirin, or Gillette Razors. All these articles are made as identical in design and quality as possible. Each one is fungible to its fellows under the same trademark or brand.

Many and various other examples of modern special fungibles can be given, and it makes no difference whether the value lies in the thing itself or in the service or value it represents. Thus a share of Steel Corporation stock of a certain class or grade is fungible to all other shares of the same corporation of the same class or grade. A railroad ticket issued for a certain trip of a certain class over a certain railroad between certain points is fungible to all other tickets of the same road for the same ride. So with

theater tickets to a certain performance for a certain night. The price groupings are based on fungibility.

Postage stamps of a certain issue for a certain amount are fungible to all other stamps of the same issue and denomination.

Books of a certain publisher under his imprint and of a certain issue are fungible to all other books of the same issue under the same imprint.

The Fair Trade Act in question relates not to non-fungibles—not to horses, cows, bulk potatoes or loose milk, but merely to things the units of which are made fungible or standard to each other by bearing "the trademark, brand or name of the producer, owner, grower, baker, maker, manufacturer or publisher."

The uniform price for trademarked goods is dictated by their fungibility and by the so-called law of market price which is formulated as follows:

There Can Be Only One Price for the Same Thing in the Same Market at the Same Time.

This phenomenon is called a law because it always operates due to the fact that no sane or normal seller will accept any price higher than the highest price offered for the thing he is selling in that market at that time, and, similarly, no sane and normal buyer will pay more than the lowest price at which the thing he wants is offered at that time in his market. Moreover no trader will submit to being undersold in the same market on the same article at the same time with the same kind of customers.

The same things may have different prices at the same time in different markets, or in the same markets at different times, or different prices may prevail for different makes of similar things in the same market, but where (a)

the things are the same (b) the market is the same and (c) the time is the same, then only one price can prevail because no seller will accept less and no buyer will offer more.

Sometimes markets may differ in size. People in shopping for one kind of thing will not go further than the corner store but with other things they will travel for miles. The market for one thing may be geographically small and, for another, large. But whether large or small the market for each thing is a relatively definite area, and in that area that thing will fetch only one price at a certain time, if its absolute fungibility is attested by the trademark or brand of the producer.

The act in question, therefore, is limited by its terms, to things which, because their fungibility, their sameness of quality and make, their standardization of value, is attested by the trade-mark, brand or name of the producer, can sell only at the same price in the same market at the same time, and the real and substantial dispute between the plaintiffs and the defendant is whether the uniform price at which plaintiff's goods whose fungibility is attested by the trade-mark, must necessarily sell at a certain time in the market, shall be a price set by the brand-owner or shall be set at this level or that by competition between different dealers selling the trademarked goods at prices dictated by the principle of taking losses on some goods to lure customers who can be overcharged on other goods of unknown value.

The producers do not care what prices the dealers charge for non-fungible goods, but they insist on their right by contract to stipulate the price at which different retailers shall sell trade-marked fungibles.

Price-cutting or unregulated competition in the resale of branded fungibles injures the producer in either or both of two ways:

a. Where the article is expensive, like a motor car, and must be sold by specially trained men, price-cutting demoralizes the sales force as will presently appear.

b. Price-cutting also interferes with the wide physical distribution of trademarked articles, because many dealers are unwilling to handle or push an article which is being slashed by the price-cutters.

It is because of the grave damage done to the business of the trademark or brand owner and to the small or independent dealers and to the public by reckless price-cutting that various legal means have been worked out to prevent unregulated price competition in branded articles. A few examples of these plans for protecting fungibles against injurious price-cutting will be helpful in clarifying the subject.

Prices Are Maintained on Newspapers and Magazines Which Are Special Fungibles.

The resale prices on newspapers and magazines are not cut. The prices are always rigidly maintained without injury to the public. If, for instance, the publishers of the New York Times were to permit retail price-cutting, that paper would vanish off the regular newsstands almost over night. Price-cutting stores would offer the "Times" free to each purchaser of such and such a quantity of other goods, and the newsdealers who depend on regular profits, would be able to sell so few copies in competition with the gift or premium price-cutters that there would be no incentive to carry the paper in stock for sale in the regular way. Therefore the newspapers and periodicals maintain a rigid resale price policy and any dealer who sought to offer a three-cent paper for one cent would instantly find

his supplies cut off. Owners of trademarks on national fungibles grow ironical when they read editorials denouncing the Fair Trade Act in metropolitan newspapers which cater to large price-cutting interests and yet maintain the strictest resale price policy on their own newsstand sales, standing prepared to cut off the supplies of any newsdealer so iniquitous as to cut the prices on their fungible product.

Prices Are Maintained on Postage Stamps Because They Are Special Fungibles.

The Federal Post Office Department finds nothing oppressive to the public in the maintenance of a strict resale price policy on postage stamps. Title 39, Chap. 9, Sec. 363 (R. S.) § 919 enacted by Congress prohibits the sale of postage stamps except at par. The Post Office knows that if price-cutters were permitted to give away stamps as premiums the wide distribution of stamps in stores and the like would vanish. No wise storekeeper would care to charge for stamps which the price-cutters were giving away as premiums to lure customers down town. And so the little shopkeepers, rather than run the risk of being regarded as overchargers, would simply cease to carry stamps at all.

If price-cutting is such a fine policy on other fungibles why does not Congress permit it on stamps? Price-cutting would harm the sale of stamps and it harms the sale of other trademarked articles in the same way.

Other Special Fungibles Are Price-Protected.

Nor are the problems of salesmanship any different when applied to life insurance or sales of stock or railroad tickets, than when automobiles or electric motors are in-

volved. Highly trained salesmen are needed in the sale of insurance. Such corps of men devoting their lives to the sale of insurance could never be maintained if price-cutting were permitted. One salesman would not take the time to work up a sale of a certain policy in a certain company if at the last minute a price-cutter could steal the sale by splitting his commission with the insured on the same policy in the same company.

Therefore, the various States have enacted criminal statutes to prevent the cutting of prices on insurance. All of the policies of a certain type in a certain company are fungible to each other—and only one price can be maintained for each type of policy of the same insurance company in the same market at the same time. Price-cutting or premium-splitting would demoralize the ranks of insurance men and injure the companies and the public as quickly as it demoralizes the retail dealers who sell branded or trademarked products or the railroads where price-cut tickets are concerned.

Stock exchange brokers and advertising agents likewise are offering what may be described as a fungible type of service in the purchase or sale of stock or advertising space. Their commissions are rigidly fixed so as to prevent price-cutting demoralization or competition based on price-inducement rather than service.

This Court Has Previously Protected Lawful Contracts Against Injury by Unfair Competition.

Railroad tickets may be called personal contracts but they are also physical commodities and were once dealt in freely by many dealers known as ticket scalpers. It was recognized as axiomatic that one ticket for a certain passage

on a certain railroad is fungible to another ticket for the same ride. The law of market price made it quite impossible for a railroad ticket office on one side of the street to charge a scheduled price for a ticket where precisely the same ticket and ride was being sold across the street at a cut price. In this instance it was the Supreme Court itself which applied the remedy of protection against unfair competition to this impossible situation. No statute was enacted as was done to stop price-cutting on insurance. The Supreme Court made its own statute. It issued its injunction (*Bitterman* v. *Louisville & N. R. Co.*, 207 U. S. 205, 222, 224, 52 L. ed. 171) against the transportation sold by price-cutters.

The theory of this equitable remedy as worked out or invented by a court of equity was precisely the theory embodied in the Fair Trade Act in issue. The court found that the contracts between the railroad and its passengers were lawful contracts and that the ticket scalpers as strangers were nullifying the contracts and competing unfairly with the railroads by dealing in price-cut return tickets—and the court enjoined and suppressed the scalpers.

Books Are Special Fungibles Controlled by the Law of Market Price.

Books of the same publisher and edition are just as fungible to each other as are tickets of the same railroad for the same ride or identical policies in the same insurance company offered by one agent at a cut-price to take a sale away from the salesman who really worked it up.

Surely there could be no keener competition than that between the publishers of different books or the makers of

different motor cars but such competition has always been on a strictly maintained retail price basis. Defendant may try to confuse this fact by claiming that allowances on used cars are like price-cuts, but the truth is that if one salesman works up a sale for a certain car on a certain used car allowance, no other salesman of that company would be permitted to steal the sale by offering a larger used car allowance on the old car.

Motor cars are sold strictly on a basis of no competition between dealers handling the same make of car. This is no more truly to be regarded as a restraint of trade or as a form of "price fixing" in violation of the constitution, than are the maintained retail prices on books, newspapers, periodicals, or postage stamps, or the standardized and uncutable commissions imposed on stock-exchange, insurance or other brokers.

In the case of insurance and automobiles the competition is keen. Each company is competing with other companies, but the salesmen are prohibited from cutting prices or commissions as between other salesmen of the same company.

Surely a department store or other local price-cutter, under its theory of being a purchasing agent for the public, should no more be permitted to cut prices on trademarked fungibles than are the insurance agents, stock brokers or ticket scalpers or others who are dealing with fungible values or services of various sorts. If stock brokers, insurance agents or branch post offices were permitted to cut prices or to make prices or commissions depend on the competition of the market, there would be just as much demoralization, trickery and restraint in these lines as now exists in the distribution of branded or trademarked fungibles, at least in those lines which cannot be pro-

tected by expensive consignment, agency or refusal of sales systems for boycotting the price-cutters.

There is nothing either new or strange or oppressive to the public in systems of resale or retail price-standardization as applied to various fungible values, and these are not regarded as prohibited or unconstitutional forms of "price fixing".

On the contrary, price-cutting as applied to fungible values like brokerage, insurance, postage stamps, railroad tickets and the like has been recognized as an unmixed evil to be suppressed by use of the police power through equitable injunction or by statute. The defendant here has no more vested right in the privilege of price demoralization on branded fungibles like Pyroil products, than did the ticket scalpers have in the privilege of selling tickets at cut prices. No more property was taken in one case than in the other.

On the case as pleaded the defendant admits that he bought the trademarked goods in issue after the contracts were made and with knowledge of the restrictions on his alleged right of resale imposed by those contracts, if the lawmakers acted within their power.

In the instances referred to it was found that indiscriminate price-cutting on fungible values was demoralizing and uneconomic. If permitted it would drive postage stamps out of general circulation and confine their sale to branch post-offices. It would drive newspapers and periodicals off the newsstands of all but those owned by great chains and monopolists.

Price-cutting on taxicab fares would soon drive the independent taxicab off the streets. The insurance business could not long survive a policy of premium price-cutting. Only tricksters would dare embark in the business.

Legalistically or metaphysically considered, these various businesses with their standardized price systems could be sorted this way or that under the principles of private contract, public regulation or the police power but they are all good examples in an economic sense of the same thing, namely:

> the inexorable operation of the law of market price on a fungible thing, value or service.

The feature of fungibility is present in every instance and that means that there can be only one price for the same thing in the same market at the same time. If one agent cuts the price of a certain "policy" on insurance in a certain company in a certain market at a certain time, other agents must meet or better that cut or be driven out of business.

Foreign Practice.

In matters of trade, business and distribution, the leading European nations have had centuries more of experience behind them than we have had and they have long adopted and maintained the practice of price-standardization of fungibles not only in all the lines of business and practice previously mentioned but in the distribution of merchandise under trademark or brand.

In England, France, Germany, Spain and other important countries, cutting the prices on trademarked, branded or other special fungibles in order to attract trade in the identical things away from other dealers is banned. The cutting of a price on a trademarked article or so-called "proprietary" is a police court offense in some countries. In Spain by statute, the trademark owner merely stamps his price on his goods and it follows the article through all the

channels of trade. The same result is reached in effect elsewhere. No restraint of trade results.

In England there is a well-established association known as Proprietary Articles Trade Association, called for short, "P. A. T. A." Owners of trademarks or brands are eligible to membership and if a dealer cuts a price on one proprietary all the other members legally can refuse to sell him any of their goods. This is apparently a substantial extension of the forms of "boycott" price maintenance which are legal in the United States but it does not in practice work a restraint of trade. It merely bans an injurious practice. No prices are cut and the little dealers have not been driven out of business by an unhealthy growth of retail chains on one hand and producer chains on the other or by general price demoralization.

We cite this instance of the British P. A. T. A. principally to show that in foreign practice it has long been demonstrated that there is nothing of a monopolistic, restraining or oppressive character involved in the practice of permitting the producers of proprietaries, trademarked or so-called branded articles rigidly to control the retail prices on their own fungible goods. Each branded article is in the keenest possible showcase or other competition with all the other products. Carter's Little Liver Pills, for example, are always in strong competition with other remedies.

The price set by the producer on his proprietary or fungible product must always meet rigid tests which absolutely insure the maintenance of fair competitive conditions.

Names or brands do not constitute a monopoly. Everyone can choose some kind of a trademark and embark in the manufacture and sale of a branded product, and whenever the branded fungibles in a certain line tend to be

overpriced, the public will quickly turn to bulk or unbranded or competitive substitutes.

The chief difference between foreign and domestic trade in proprietaries or fungibles is that abroad the costs of retailing have not soared up from approximately 10% to approximately 35%, as they have in the United States in certain lines under the malign effects of indiscriminate price-cutting on trademarked or loss-leader goods by great chains and department stores which are draining the economic life blood of the outlying districts down into the great metropolitan centers.

The large price-cutters like to talk about handing on the "economies" of their gigantic downtown stores with large real estate investment, high rents, appalling taxes, expanded wages, tremendous overhead and fantastic advertising, to the consumer, but the plain every-day facts are that when people used to give their fair volume of purchases to their little independent local tradesmen, the cost of doing business in many lines was as low as ten cents on the consumer's dollar, whereas the demoralizing practice of using standard brands as "loss leaders" to mislead the public about values and to lure them away from the local stores with their low rents, small taxes, inexpensive clerk hire and modest circulars and attract them down to great metropolitan shopping centers, has added a sheer twenty-five per cent. onto the cost of doing business, and the public must pay this increased burden.

Loss-leader price-cutting on trademarked or branded articles gives people a false idea that their local dealer who is charging the regular retail price is overpricing the proprietaries and other goods as well. The fantastic price manipulation downtown (price-cutting recently sent the

price of the Modern Library regularly sold at one dollar down to 9 cents) since the turn of the century, has skimmed away all the cream of the trade from the low-cost neighborhood and country stores. Shrinking volume of trade has left them still with their old expenses of rent, taxes, etc., but has driven up their cost of doing business by imposing all their expenses on only those comparatively few purchases which a deluded public still makes at the independent neighborhood stores. By driving up all costs of doing business, the price cutters of trademarked goods are enabled to slide their own high prices onto a public which falsely believes it is a beneficiary of new and modern economies.

Those mounting costs of doing business accompanying the practice of using trademarked, standard or fungible values as loss-leaders are the answer to any claims of economies based on price-cutting, and if these plain economic facts are not conceded as matters of general knowledge on this hearing, the case should be remanded for general proofs—so as to put flesh and blood on the bare legal skeleton presented by the demurrer—before, in short, the Court should assume *in vacuo* the unconstitutionality of an act aimed at undeniable economic evils.

Abroad, where price-cutting and use of proprietaries as loss leaders is not permitted, the total volume of business is still fairly distributed. The local stores still have both the cream and the milk of the business instead of being left to cater merely to the skimmed milk of the trade, and the cost of doing business has not risen to towering heights through fantastic methods of advertising and price manipulation of standard values.

Bargains may be had abroad but not in trademarked or fungible value goods, and great metropolitan, chain store and catalog advertisers and price-cutters have not been

permitted to wreck the national or standard system of producing branded articles and distributing them everywhere for sale at standardized prices through independent or one-store dealers.

Foreign Practice as to Price Maintenance on Books.

The book trade in its argument for price maintenance or branded articles has back of it the experience of over a hundred years in Europe, where one country after another has adopted the uniform price method—the method of letting the producer and the dealers agree on the five dollar price for this book, the two dollar price for that one—or the fifty cent price for the other one.

Germany, all the Scandinavian countries, France, Holland, Czechoslovakia, Italy, Spain, have long used this system. The last country to adopt the plan was Great Britain, in 1899.

All of the countries look upon price standardization as the only possible basis for national distribution of books. In England it is regarded as the cornerstone of the industry. When the new nation of Czechoslovakia was organized, a complete set of rules for the industry was outlined and approved by the government, and the whole basis of this was uniform prices throughout the country, with no increases and no decreases from the level set by the producer. England was converted to the idea after a half century of argument and has never wavered in its belief in its importance and social significance.

It is to be noted that no one in this country has ever considered that book prices in Europe were high because of uniform prices; in fact, students of the commerce in books believe that the wide distribution made possible by confidence in the various competitive price levels for various

books of different publishers, brings about the distribution that makes Europe greater users of books per capita than America. Each publisher is looking for the uniform price of greatest return on each item he publishes. If any book is priced too high, the publisher and author lose out. The public will not buy.

The retail or newsstand prices of newspapers are absolutely fixed both in America and abroad. Many magazine prices are absolutely uniform, and the cutting off of supplies has always proved an easy way to discourage price-cutters. Magazine subscriptions are fixed by the publisher and lower prices are offered only in such cases as advance subscriptions.

Society as a whole benefits from uniform or standardized prices. Textbook prices are fixed by contract with the states which buy them. Such contracts provide that prices paid by one state shall be no greater than those paid by other states and certainly never any less, because that would infringe the contract binding in other states. Thereby uniformity is accomplished but competition in real book values, namely, in the contents, is stimulated, just as it is with newspapers and magazines.

In low-priced books, far and away the best purchase and the greatest book value available is that made possible by the fixed price system of the ten-cent stores. They do not produce their own books but they would cease to handle them if anyone cut the price elsewhere below ten cents.

Without the huge distribution through these great outlets the ten cent price on books as fine as these ten cent books are, would be impossible.

The same is now true of the books in the twenty cent level.

This is one indication of the fact that society gains by uniformity of price which makes possible wide distribution. Wells' "Outline of History" was another example. It was

published at first in two volumes at $10.50. Some price-cutters sold this edition at $7.79, and argued that this was a great saving to society, but it was the subsequent sale of the book at a uniform price that permitted the issuing of a $5 edition, and that made way for the final $1 edition, which was one of the greatest bargains ever offered the public. It was not price cutting from $10.50 to $1 but increased market that permitted the lower prices. There is where society's interest really lies.

The Act Is a "Trade Act" Rather Than a Property Alienation Act.

Defendant apparently sought to present the case below as though the plaintiffs' products he owned were private property of a nature not affected with a public interest and that the Legislature had endeavored to prevent him from selling his property except at a price arbitrarily fixed by other dealers.

This is not the case. The statute in question regulates the trademarked goods only while in the regular channels of trade. Defendant can close out his line of plaintiffs' products at any time, for any reason and at any price he pleases to charge.

All that the Fair Trade Act does is to regulate trademarked products in the regular course of trade. It is a trade-regulating act rather than an act changing the right of alienation of property after it has left the regular channels of trade. The Act has to do with dealers buying goods for resale, and the goods are restricted only so long as they are regularly in trade. Even a regular dealer under contract can convert the goods into ordinary property, so far as he is concerned, at any time by a close-out sale or under a court order or when the goods are damaged or deteriorated.

The Legislature when permitting the regulation by contract of a certain class and type of identified goods only so long as they are being purchased for resale in trade, the goods being free as soon as any trader wishes to close them out, is not enacting a statute fixing the alienation rights of property in general. Defendant seeks to free himself, not his goods. He wants to sell at close-out prices while continuing to buy new supplies of plaintiffs' goods for resale at cut prices.

Plaintiffs' identified goods can have only one price in the same market at the same time. The lowest price is the highest a buyer will pay in that market at that time. Defendant wants to fix that price by his individual caprice. The Legislature authorizes the price to be fixed by voluntary contracts between the producers and dealers in a competitive market and the Legislature decrees that such contracts shall be protected against nullification by strangers. The Legislature has the same power to decree that prices may be determined by vertical contracts in a competitive market and with protective safeguards to prevent nullification of the contracts as it has to decree that prices shall be determined by capricious individual action.

The Fair Trade Act is not a price-fixing act and if it be construed as one it still is not repugnant to the Federal Constitution.

Defendant admits by his demurrer that he possesses some of plaintiffs' trademarked products and has sold and is selling the same below the prices set for such products in contracts between plaintiffs and their regular dealers.

Defendant contends that plaintiffs and their contracting dealers under the Fair Trade Act are setting prices which defendant must abide by and that this

(a) is a price fixing scheme and

(b) deprives defendant of his right and privilege to do with his own as he wishes.

The constitution does not prohibit price-fixing in businesses which are affected with a public interest.

Munn v. *Illinois*, 94 U. S. 113, 24 L. Ed. 77;
Nebbia v. *New York*, 291 U. S. 502, 54 Sup. Ct. 505, wherein Mr. Justice ROBERTS stated:

"The Constitution does not guarantee the unrestricted right to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited and the right to conduct a business or to pursue a calling may be conditioned * * *. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency (citing many authorities).

"Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination" (citing statutes and authorities).

Plaintiffs' prices are set by voluntary contracts made with its dealers in a competitive market. If plaintiffs' products are priced too high, the public can turn to competitive trademarked products or even to unbranded goods.

But the statute, being a trade act, does not force defendant to abide by prices set by plaintiffs under their contract plan. Defendant can always close out his entire line at any price he wishes to charge. This case concerns not defendant's full control over property he owns and wants to sell without dictation, but merely defendant's al-

leged right to continue day in and day out, year in and year out, a cut-rate business in nullification of the contracts between plaintiffs and their dealers.

The question is—does the constitution guarantee to plaintiffs a vested right to continue a cut-rate business in appellee's branded goods without being guilty of unfair competition and does the Federal Constitution inhibit the Legislature from decreeing that prices on identified goods shall be determined by competition *between producers* rather than between distributors?

The legislature evidently thinks that competition concerned with trademarked or identified goods is better between producer and producer and regulated by voluntary contracts between producer and dealers, than by capricious and individual action of the dealers. The Legislature evidently regards protected-contract-price maintenance as a competitive check upon agency, combination or boycott price maintenance.

It is just as fair and lawful to stabilize prices for branded goods in a competitive market by protected contracts as by agencies, consignments, chains and refusal of sales. Especially are the contracts better because the goods can be freed by close out, damaged goods or court order sales.

Plaintiffs by setting up their own wholesale depots and refusing to sell goods to price-cutters can lawfully project their control over goods as to which they have already parted with title.

If plaintiffs can do that without violating the constitution, the legislature can empower them to part with title to their branded goods subject to a price restriction as to future sales while in the ordinary channels of trade without

violating the constitution. The constitution looks to the substance of the thing rather than to forms.

If plaintiffs can lawfully maintain prices on their branded goods by a combination of twenty-one thousand sales agents without transfer of title, they should be permitted to combine the same twenty-one thousand dealers with the same prices set up by contract.

When the public buys a Mazda lamp it does not know or care whether title passed or not while the article was in trade channels. The only difference is that when title does not pass in trade transfers, the public has to pay for a more expensive and more discriminatory method of doing business than when title does pass.

The Act in question instead of being capricious and discriminatory has sought to prevent discriminations which now exist in intrastate and interstate trade because concerns of large capital can prevent price-cutting on their goods by means of lawful but expensive agencies, consignments, refusal of sales and chain systems, while small concerns cannot use the more democratic system of protected vertical resale contracts.

From the standpoint of public, trade and legislature, the only difference between price maintenance based on retention of title or consignment systems and protected contract systems is wholly in favor of the latter.

An undue emphasis on price maintenance based on retention of title or projection of control after title has passed by refusal of further sales, has turned out to be a policy which fosters monopoly.

The Fourteenth Amendment does not inhibit the State from legalizing price maintenance based on vertical contracts with passage of title permitted and adequate protection afforded against damage by strangers, as a competitive

check upon already lawful systems of price maintenance based on consignments, agencies or refusal of continuing sales, by declaring in effect that trademarked articles belong under the exception to the rule against alienation and may be sold or transferred with a valid restriction upon prices while in the ordinary channels of trade, such valid contracts being protected against damage for nullification by non-confirmist traders under well-known equitable and police principles.

Section 1½ is the heart of the act. If that is killed the whole act dies. If the contracts are good Section 1½ is a reasonable and ordinary means for their protection. If Section 1½ is bad, the contracts are no good to anyone at any time, whether valid or not.

Why did the General Electric Company raise the many millions of dollars necessary to stock twenty-one thousand or more dealers all over the United States with Mazda lamps title to which was retained until a consumer sale was made? They assumed this monumental burden merely to keep one or two price-cutters in each market from getting any lamps. One bad oyster spoils a stew and one price-cutter makes a whole market sour.

Why did the great shirt and collar companies raise the vast sums required to retain title to their trademarked products at wholesale in every important market in the country? They did it so as to project their control over all the goods they had already sold and on which title had already passed to retailers. They supplied retailers on a hand-to-mouth basis so that one who cut a price today would be out of stock tomorrow. In short, the potential menace

of one price-cutter in each market robbed the formerly independent wholesalers of the business they had formerly done in these important trademarked goods.

Both the General Electric Company and the shirt and collar people took up these gigantic bows which no little producer could bend, because this honorable court, in the case of *Dr. Miles Medicine Company* v. *Miles, supra,* said to them that if title to their goods passd, they were restrainers of trade but if the title did not pass they were not restrainers of trade. This court freed the goods from contract restrictions and thereby enslaved the formerly independent retailers who became hired, regimented agents charging dictated prices for goods they did now own.

What social, economic or legal gain was that? What price does the public pay when it forces the unwilling Electric Company to continue to own millions of Mazda lamps all over this vast country, merely to prevent one or more price-cutters in each market from getting any of the goods? Independent wholesalers and retailers would gladly purchase these goods under price restriction contracts if permitted and protected against unfair competition.

These two instances are graphic evidences of the fact that Section 1½ is the heart of the Fair Trade Act. If price cutters could lawfully get hold of Mazda lamps to sell at cut prices, the whole agency or consignment plan of price protection would collapse and be abandoned. If price cutters can sell the same goods at lower prices, the contracts are nullified and fall. When a price-cutter marks down a trademarked article on his own shelf, he marks down the same article on the shelves of all his competitors.

For the court to hold that the contracts are good in California but that, constitutionally speaking, they cannot be protected against non-contract nullifiers, is to say that the

body may live but the heart must die. It is to say that the *Miles-Park* rule, grounded in common law principles of alienation, shall be embalmed in the Constitution and become alterable only by constitutional amendment.

It makes no difference whether the result is reached by holding the contracts themselves to be invalid, as the court did in *Miles* v. *Park, supra,* or by holding that the contracts are valid but that they cannot be protected, in view of the 14th Amendment, against nullification by strangers; the effect is the same in either case.

If the court shall hold that Section 1½ of the California Act is unconstitutional, the pernicious doctrine that prices may be stabilized by agency, chain-outlet, refusal of sale and other plutocratic combinations, but that the same result cannot be reached by democratic protected contracts, will become embedded in the 14th Amendment and the Sherman Anti-Trust Act will become a legal monstrosity—the father rather than the destroyer of trusts—the protector of the rich and a juggernaut crushing out small, independent producers, wholesalers and retailers.

Other producers besides the General Electric Company may lawfully make incandescent electric bulbs, but they can get no distribution unless they protect their dealers against price-cutters. That means that unless Section 1½ of the Act in question is sustained, little producers cannot operate without having to supplement their manufacturing capital with unprocurable sums of distributing capital. To laden production with the burden of vast capital necessary for distribution without sale or transfer of title is in effect to deliver production over as a monopoly of the wealthy; to create an Aladdin's Cave to which only those of the Midas class have Open Sesame.

It is this mistaken policy which has helped to convert a minimum capital country with its small independent produc-

ing and distributing units into the maximum capital country it has become since loss-leader price-cutting became legalized and rampant through the Miles-Park ruling.

The Legislature of California believes that the Act in question will tend to turn the tide of maximum capital economy—of giant combines—back toward the former days of minimum capital economy based on small independent, competitive producers and dealers each performing its own function as producer or distributor—each living and letting others live.

It would be interesting to speculate when and how anything could ever have gotten into the Federal Constitution that could possibly prevent the Legislature of California from declaring that contracts relating to competitive trademarked goods shall be both free and inviolate from destruction by selfish strangers—by knaves operating for ulterior purposes as Mr. Justice HOLMES phrased it in his dissent in the *Miles-Park* case.

Surely a country whose Constitution upholds the right of Goliath to have his spear but prohibits David to have his slingshot is heading away from democracy toward what Mr. Justice HOLMES in *Miles* v. *Park, supra,* so prophetically described as "perilous country".

The judgment appealed from should be affirmed.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 55

THE PEP BOYS, MANNY, MOE & JACK of California, a corporation,

Appellant,

vs.

PYROIL SALES COMPANY, INC., a corporation,

Appellee.

MOTION ON BEHALF OF R. H. MACY & CO., INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

THE PEP BOYS, MANNY, MOE & JACK of California, a corporation, Appellant, vs. PYROIL SALES COMPANY, INC., a corporation, Appellee.	No. 55.

MOTION ON BEHALF OF R. H. MACY & CO., INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for R. H. Macy & Co., Inc., respectfully moves this Honorable Court for leave to file the accompanying brief as *amicus curiae*.

The question involved in the present case is whether the Fair Trade Act of the State of California (*California Statutes*, 1931, Chap. 278, p. 583, Sec. 1; *California Statutes*, 1933, Chap. 260, p. 793, Sec. 1½) is unconstitutional as in violation of the Fourteenth Amendment of the Constitution of the United States.

The reasons for asking leave to file the accompanying brief are set forth at the beginning thereof.

The attorneys for the appellant and the appellee have consented to the filing of the brief by the undersigned.

Dated, New York, N. Y., October 28, 1936.

LEON LAUTERSTEIN,
Counsel for R. H. Macy & Co., Inc.,
as *amicus curiae*.

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THE PEP BOYS, MANNY, MOE & JACK of California, a corporation, Appellant, vs. PYROIL SALES COMPANY, INC., a corporation, Appellee.	No. 55.

BRIEF ON BEHALF OF R. H. MACY & CO., INC., AS *AMICUS CURIAE.*

I.

Preliminary Statement.

Reasons for Application for Leave to File Brief as *Amicus Curiae.*

A. The undersigned appeared as attorney of record in the case of *Doubleday Doran & Co. et al.* v. *R. H. Macy & Co., Inc.,* 269 N. Y. 272, wherein the Court of Appeals of the State of New York declared a New York statute, identical in language with the California statute here challenged, to be unconstitutional as violative of the Fourteenth Amendment of the Constitution of the United States. A determination by this Court that the statute involved in the instant case is constitutional may lead to a different decision by the New York Court of Appeals or prompt similar legislation.

Inasmuch as R. H. Macy & Co., Inc., may be affected by the decision of this Court in the present case, it asks leave to file this brief as *amicus curiae*.

B. The challenged statute, if sustained, may cause substantial injury to R. H. Macy & Co., Inc., as well as to other retailers.

R. H. Macy & Co., Inc., conducts a large department store in the City of New York.

For more than seventy-five years R. H. Macy & Co., Inc., and its predecessors have been engaged in the sale of merchandise at retail for cash only. The saving to customers from the policy of selling for cash only and from efficient operation has been extensively and continuously advertised throughout the business existence of R. H. Macy & Co., Inc., and its predecessors. Its growth from a small store to a great merchandising institution has been due in large part to the fact that (except during the period of N. R. A. price restrictions) it has enjoyed the freedom of fixing the selling price of its own merchandise. It has been able to pass on to its customers the savings of its cash policy and its efficient operation. It has been able to sell to its customers merchandise which they desired at prices which they could afford to pay; and it has not been compelled to charge customers for services which they did not want and for which they could not pay without foregoing the gratification of other wants. It has been able to adjust its own business to its internal requirements and to the requirements of its customers.

The challenged statute and similar statutes in other States destroy the freedom heretofore enjoyed by retailers in fixing the selling price of their own merchandise. In many cases this freedom is all that permits a retailer to stay in business. A retailer's most valuable asset is his ability to increase trade by passing on to his customers, through price reduction, the savings due to efficient operation and his particular method of doing business.

The statute here challenged—however it may be described—in operation and effect necessarily strikes at sound, honest and essential principles of retail business. To deny to the retailer the freedom of honestly selling his own goods at his own prices and to oblige him to sell only at a price arbitrarily fixed by private persons who have no interest in his business, is beyond the constitutional limits of legislative power.

Because of the injury threatened to R. H. Macy & Co., Inc., if the challenged statute is sustained, leave to file this brief is requested.

Statement of the Case.

Reference to the opinions below and a complete statement of the case will be found in appellant's* brief. Extended repetition is unnecessary.

The appellee, a wholesale distributor (but not a producer) of a motor lubricant sold under the name of "Pyroil," sues to enjoin the appellant, a retailer, from selling that commodity below the price fixed in contracts between the appellee and other retailers.

The appellee's case is based entirely upon Section 1½ of the challenged statute, and but for that statute there would be no pretense of a cause of action.

By virtue of that statute, an injunction has been sought and obtained restraining the appellant from selling its own merchandise at prices below those fixed in contracts made between the appellee and other retailers and to which appellant is not a party.

It is not charged that the appellant is a party to any price-fixing contract or that it has induced the breach of any contract.

It is not charged that the appellant has infringed any trade-mark rights or passed off spurious goods as genuine, or that the articles which the appellant sells were not in fact Pyroil products.

It is not charged that the appellant has in any manner acted fraudulently or dishonestly.

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* The parties will be referred to by their designations in this Court.

It is not charged that the appellant has sold merchandise at a loss or below cost, or with an ulterior or malicious motive, or for any illegal purpose.

It is not charged that the articles which appellant sold were ever subject to any price restriction unless restriction is validly imposed by the challenged statute.

In substance, all that is charged is that the appellant is selling its own merchandise at prices less than those fixed for similar merchandise by agreements which have been made between private parties and to which the appellant is not a party.

The Basic Statute.

The statute is printed in full in appellant's brief. We merely summarize its provisions:

Section 1 of the statute purports to legalize contracts fixing the resale price of any commodity (i. e., any subject of commerce) which bears the purchaser's trade-mark, brand or name, save in three excepted cases, namely, sales of discontinued goods, sales of damaged goods, and sales by order of court.

Section 1½ goes farther and provides that wilfully and knowingly advertising, offering for sale, or selling any product bearing the producer's trade-mark, brand or name by anyone—*even though he is not a party to any contract fixing the resale price*—at less than the price fixed by a contract between "any vendor" of such product and any other person is unfair competition and is actionable as such at the suit of any person damaged thereby.

Gist of Appellee's Cause of Action.

Stripped of all technicalities the case comes down to this:

A man owns a can of motor oil, a book, a barrel of flour, a jar of cold cream, or any other article which bears the producer's name or brand. The article has been lawfully pur-

chased for $1. The brand may have been in use only a week, or a day, and may or may not be entitled to protection under the Trade-Mark Law. The owner of the article has made no contract with anyone affecting the resale price of the article. He has induced no breach of contract. He has been guilty of no fraud. He seeks to sell the article at a price of his own choosing—say $1.98. He has a customer who needs the article and wishes to buy it at that price. A wholesaler then steps in and says to the owner of the article: "I have made a contract—not with you, but with someone else—that such article shall not be sold below $2.50, or whatever other price I, in my discretion, choose to stipulate in some contract to which you were not a party. It makes no difference that you have bought and paid for the property and that you lawfully own it. It makes no difference that after the purchase you had all the risks of ownership, resale, deterioration, theft, fire, storage, etc., and that I have not assumed any of these. It makes no difference that you can sell it at 98 per cent. profit and that that price is all that your customer can afford to pay. If you sell for less than $2.50, or even one cent less than any other price which is stipulated in some contract to which you are not a party, you will be mulcted in damages and enjoined because the Legislature has given me the entire judicial and executive power of the State to enforce my will over your property. My reason for fixing the price at $2.50 is none of your business. Likewise, my reason for proceeding against you and not proceeding against some other retailer is none of your business. You will sell your own property for at least $2.50—or you will not sell it at all."

This, in substance, is the appellee's claim. This power over another person's property is what was intended to be given to private persons by the challenged statute, despite the appellee's endeavor to put the statute in a more favorable light and to describe it in unrealistic terms.

Analysis of the Statute.

As bearing on the constitutionality of the statute, we note its following aspects:

1. The statute is a private price-fixing act. Private persons—producers, wholesalers, or "any vendor"—are given the power to fix the price at which another person must sell his own property if he sells at all.

2. The power to fix the selling price of another's property is given to private persons irrespective of any consent or agreement thereto by the owner of the property.

3. The power may be exerted over any commodity (i.e., "any subject of commerce") provided that it bears a trademark, brand or even the manufacturer's name. The statute is not confined to any paramount industry which, for special reasons, requires special regulation. Within the broad scope of the statute is every commodity, necessity and luxury alike, and also every industry regardless of its economic importance, its relation to the community or its internal condition. The price of every ordinary commodity handled by every ordinary business may be fixed.

4. The statute is not, and does not purport to be, an emergency measure. It was intended to be written into the law for all time.

5. There is no legislative or administrative finding that price-fixing is necessary with respect to any commodity or industry. The question of whether prices shall be fixed at all is left entirely to the individual discretion, whim or caprice of a producer, wholesaler or "vendor."

6. Prices are not fixed by the Legislature or by any impartial State officer or body after due notice and hearing, but by private persons. No public body supervises the prices fixed. Neither the owner nor the consumer (the persons most

affected by price-fixing) is given any opportunity to be heard, much less any voice in fixing the price. No body, either judicial or administrative, can review the price fixed by private persons.

7. The price may be fixed in the uncontrolled and absolute discretion of a manufacturer, distributor or "vendor" for any reason, or for no reason. It may be fixed high, low, or anywhere in between. It may be fixed arbitrarily, capriciously, or unwisely, or because of mistake, ignorance or malice. It may be imposed, withdrawn and changed when and as private persons will. There are no standards or limitations prescribed by the statute. Once a manufacturer, wholesaler or "vendor" fixes a price, his will has the force of law if he or some competing retailer chooses so to regard it. And if the person who has the price of his own property thus fixed by others does not bow to their will, the whole executive and judicial machinery of the State is invoked against him, and he may be held liable for damages or enjoined.

8. Not only are private persons given the power to fix the prices at which another person may sell his own property, but private persons are likewise given unlimited and absolute discretion as to the enforcing of the fixed price. Failure to observe the fixed price is not made a crime, nor is the fixed price enforced by any State body or officer. The manufacturer, wholesaler, or even a competing retailer, may proceed against such retailer as he chooses. He may act for any reason or for no reason, capriciously, maliciously, or unwisely; and he may favor one retailer over another. By proceeding against a certain retailer and not against another, he may drive the former from business and favor the latter. The statute gives to private individuals the power of economic life and death over retailers.

9. There is no requirement that contracts entered into pursuant to the statute be uniform, or that a uniform price be fixed. Various special privileges may be given in connection with the contracts to some retailers and not to others. A manufacturer, wholesaler or "vendor" may enter into in-

numerable contracts, each fixing a different price with respect to the same sort of article. The statute, nevertheless, gives to private individuals the power to compel retailers who never signed any contract to observe the price fixed in "any contract."

10. The statute permits private persons to fix retail prices regardless of local conditions and regardless of the locality in which the retail sales take place. A merchant in a village in the Imperial Valley may be compelled to observe the price fixed by a contract between other persons in San Francisco.

11. There is no requirement that any contract be in writing, or that the price be filed in any public or other place. A manufacturer, wholesaler, "vendor" or competing retailer need merely say that a particular price has been fixed, and the retailer, who may have a large stock of the article on hand, must determine the truth as best he can, without any means of verification, and then proceed to sell at his peril.

12. The statute purports to give price-fixing powers to manufacturers, wholesalers and "vendors" with respect to products which are "in free and open competition" with commodities of the same general class produced by others. But it prescribes no standard or guide and no means for determining when a product is in free and open competition with commodities of the same general class. A retailer who purchases a given article and is not a party to any price-fixing contract must determine—at his peril and with no prescribed means of ascertainment—whether he is free to sell the article at a price of his own determination or whether he is bound by the price fixed by another.

13. The statute is not a prohibition upon sales below cost or at a loss. The statute proscribes sales of one's own property below a price fixed by another, and it is wholly immaterial that the person seeking to sell his own property seeks to sell it above cost, at a handsome profit to himself, with every economic justification, and at the only price that his customer offered to pay.

14. The statute is not a prohibition of price-cutting with an intent to injure or destroy a competitor. Selling one's

own property below the price fixed by another is prohibited even though the owner acts with the best possible motives and is seeking only to conduct his own business and meet competition in a way that has always heretofore been regarded as fair and honorable, and which, in fact, has been required by our Anti-Trust Laws.

15. The statute is not confined to goods to which is attached an established trade-mark, brand or name. A producer of unbranded goods may—overnight—acquire unlimited price-fixing powers merely by placing a name or brand on his product; and this power will extend over his products after he has parted with title thereto and they have come into the hands of owners who never signed any price-fixing contract. It is not necessary that the brand or name should previously have enjoyed any good will or that it will hereafter enjoy any good will or that it be entitled to trade-mark protection. "Any vendor," although he does not own any trade-mark, brand or name, or any good will appurtenant thereto, may by a contract with a single retailer fix the selling price for all other retailers throughout the state.

16. Private persons are given the power to fix the price at which a retailer must sell, regardless of his overhead and cost of doing business, regardless of the services and facilities which he furnishes to his customers and regardless of his own cash needs. No matter how efficiently a retailer may operate he is prevented from passing on to his customers the advantages of the efficient operation. Although a retailer furnishes fewer services and facilities to his customers than his competitors, under this statute he is obliged to charge the same price as his competitors although his customers do not desire, and perhaps cannot afford, to pay for elaborate services and facilities. Although a retailer's very business existence may require him to reduce his prices to convert inventories into cash, he is forbidden to do so unless he discontinues handling the price-fixed commodity, sells damaged goods or goes through a court liquidation.

Our submission is that such a statute cannot be constitutional.

II.

Argument.

Summary of Argument.

A. A person's right to fix the selling price of his own merchandise and honestly to pursue a lawful calling is liberty and property within the protection of the due-process-of-law clause of the Fourteenth Amendment, and as such it may not be abridged by legislative action except for a valid public purpose and in a way that is not unreasonable, arbitrary, discriminatory or inappropriate to a purpose which the Legislature is free to adopt.

B. Since the effect and purpose of Section 1½ of the statute is the fixing of prices of ordinary commodities sold by ordinary businesses, it is not within the scope of any constitutional power of the Legislature.

C. The means provided by the statute to achieve its purpose are unreasonable, arbitrary and discriminatory, and are wholly inappropriate to any valid legislative purpose.

D. The decision of the Court below is based upon a misapplication of *Nebbia* v. *New York*, 291 U. S. 502, and upon a misunderstanding of *Doubleday Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272.

POINT A.

A person's right to fix the selling price of his own merchandise and honestly to pursue a lawful calling is liberty and property within the protection of the due-process-of-law clause of the Fourteenth Amendment, and as such it may not be abridged by legislative action except for a valid public purpose and in a way that is not unreasonable, arbitrary, discriminatory or inappropriate to a purpose which the Legislature is free to adopt.

1. The right to acquire and use property and to fix the price at which one's own property shall be sold is an inherent

and essential attribute of property itself and is subject to the protection of the due-process-of-law clause of the Federal Constitution.

Tyson v. *Banton*, 273 U. S. 418, 429;
Buchanan v. *Warley*, 245 U. S. 60, 74;
People ex rel. Moskowitz v. *Jenkins*, 202 N. Y. 53, 57.

Likewise, a person's business is a property right and as such is entitled to protection against state legislation in contravention of the Federal Constitution.

Liggett Co. v. *Baldridge*, 278 U. S. 105, 111.

Similarly, the "liberty" protected by the due-process-of-law clause is more than freedom from physical restraint and includes freedom to contract and to pursue a lawful calling.

Allgeyer v. *Louisiana*, 165 U. S. 578, 589.

2. The fundamental rights guaranteed by our organic law cannot be abridged or curtailed by legislative action unless there are special circumstances or conditions justifying such action.

> "Under our form of government the use of property and the making of contracts are normally matters of private and not public concern. The general rule is that both shall be free from governmental interference." (*Nebbia* v. *New York*, 291 U. S. 502, 523.)

See also:

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522, 527;
New State Ice Co. v. *Liebmann*, 285 U. S. 262, 277;
Budd v. *New York*, 143 U. S. 517, 532;
Doubleday Doran & Co., Inc. v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272, 281;
Darweger v. *Staats*, 267 N. Y. 290, 307, 308;
People v. *Nebbia*, 262 N. Y. 259, 264, 265.

3. Freedom from restraint in the use of one's own property being a general rule, and restraint the exception, under what circumstances and conditions, and to what extent, may state legislation curtail the freedom of a citizen and the free use of his property? No one contends that liberty and property are absolute and free from all regulation by the state; but there are constitutional limitations beyond which the state may not go.

The answer to the foregoing question as deduced from the cases hereinafter cited is that under our system of constitutional government restrictions upon liberty and property cannot be imposed unless the restrictive enactment

(a) is for the purpose of protecting the public health, morals, safety or welfare;

(b) does not operate in an arbitrary, unreasonable or discriminatory manner; and

(c) provides means which are relevant and appropriate to achieve a valid, statutory purpose.

Judged by these basic criteria the challenged statute is fatally defective. A legislature cannot, consistently with due process of law, delegate to private persons the power to fix the selling price of all ordinary commodities dealt in by all ordinary businesses.

POINT B.

Since the effect and purpose of Section 1½ of the statute is the fixing of prices of ordinary commodities sold by ordinary businesses, it is not within the scope of any constitutional power of the Legislature.

There is not, and cannot be, any claim by the proponents of this statute that it was enacted for the purpose of protecting the public health, morals or safety. They do, however, seek to sustain the statute as an enactment to protect the public welfare. The statute cannot be so justified.

This statute is not confined to any specific industry upon which, for special reasons, the public welfare depends. It is not confined to businesses affected with the public interest, or to paramount businesses which call for temporary regulation because of economic stress or emergency.

The statute is a general price-fixing grant to private persons. It provides that no one may sell his own property, regardless of its nature, if it bears a manufacturer's brand or name at a price below that fixed by someone else. Every business—whether it is major or minor, and regardless of its economic condition or importance—falls within the broad scope of this statute.

There is no legislative finding, or even a suggestion, that all businesses are threatened with extinction because certain retailers sell at prices other than those fixed by manufacturers, wholesalers or "vendors." The general prosperity of the community is not imperiled because a retailer sells a can of motor oil, a package of razor blades, a lip stick, a book, or any other commodity for less than the price thus arbitrarily fixed.

No case of controlling authority has been found upholding the right of a state to fix the selling price of ordinary commodities sold by ordinary businesses at times which are not declared to be emergencies. On the other hand, time and again, this Court and other courts have held state statutes purporting to regulate the prices of ordinary commodities sold by ordinary businesses unconstitutional. Moreover, the very cases which have upheld statutes regulating prices under certain circumstances have emphasized the special circumstances in the particular industry calling for such regulation, and they have expressly stated that price regulation of ordinary commodities sold by ordinary businesses contravenes the constitutional guarantees of our citizens.

In the following cases state statutes purporting to fix the selling price of ordinary commodities and services were held invalid as transcending the constitutional limitations on legislative power:

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522 (Wages);

Tyson v. *Banton*, 273 U. S. 418 (Price of theatre tickets);

Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1 (Price of cream);

Ribnick v. *McBride*, 277 U. S. 350 (Fees of an employment agency);

Williams v. *Standard Oil Co.*, 278 U. S. 235 (Price of gasoline);

Doubleday Doran & Co., Inc. v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272 (Price of books);

People v. *Gillson*, 109 N. Y. 389 (Price of food).

See also:

New State Ice Co. v. *Liebmann*, 285 U. S. 262, 277, *et seq.*

The constitutional principle that the Legislature is without authority to fix the selling price of ordinary commodities is well summarized by this Court in *Ribnick* v. *McBride*, *supra*, in the following language (p. 357):

> "Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency, * * *, the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power."

In *Williams* v. *Standard Oil Co.*, *supra*, this Court applied the familiar principle that a state may not regulate the selling price of ordinary commodities and held unconstitutional a Tennessee statute purporting to regulate the selling price of gasoline. The Court said (p. 240):

> "Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country."

Can the appellee successfully maintain that motor oil is essentially different from gasoline in respect to the question

here involved? On the question of legislative power this case is essentially the same as the *Williams* case. As to the constitutionality of the means adopted to achieve the statutory purpose, the transgression of the instant statute is greater than that of the Tennessee statute considered in the *Williams* case; for the latter statute at least had the seeming virtue of impartial governmental administration.

In *Fairmont Creamery Co.* v. *Minnesota, supra,* this Court held unconstitutional a Minnesota statute which prohibited under penalty the purchase of cream at higher prices in one locality than in others (after allowances for the difference in cost of transportation). There, as here, the statute sought to compel observance throughout the state of a unit price fixed by private contract in a single transaction. There, as here, the proponents of the statute sought to justify its constitutionality by asserting that it was necessary to preserve free and fair competition. In holding that the legislative attempt was an unconstitutional interference with freedom of contract and property rights, this Court in the course of its opinion said (pp. 8, 9):

> "As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff-in-error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce, but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequent. Enforcement of the statute would amount to fixing the price at which plaintiff-in-error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions.
>
> "The real question comes to this: May the state in order to prevent some strong buyers of cream from doing things which may tend to monopoly inhibit plaintiff-in-error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public, and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer."

In each of the foregoing cases the constitutionality of the challenged legislation was sought to be upheld under the guise of protecting the public welfare. Arguments as to the elasticity of police power and the right of the Legislature to determine the economic policy of the state were pressed upon the courts. The decisions, however, with a firm unanimity, have refused to uphold statutes which in fact fixed the selling price of ordinary commodities and services. Public welfare does not require such a regulation of private business and is best subserved by leaving our citizens free to manage their own private affairs and honestly to use and dispose of their property on their own terms.

In businesses affected with the public interest and in other paramount businesses, in times of emergency, prices may be regulated. The class of businesses subject to regulation may be expanded by special circumstances, but so long as principles of constitutional law are observed, legislatures—at least in the absence of a grave emergency—cannot compel the butcher, the baker, and the candlestick maker, the artisan, the merchant, and the manufacturer to sell his commodities or services in the ordinary course of business at prescribed prices. Much less can a legislature delegate to private individuals the power to fix those prices.

Indeed, the very cases which have upheld legislative price regulation because of special circumstances or emergency threatening a particular industry, by their rationale and express language, clearly indicate that price regulation of all ordinary business cannot be justified upon any constitutional principle.

> *Nebbia* v. *New York,* 291 U. S. 502, 523, 526;
> *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389, 414;
> *Block* v. *Hirsh,* 256 U. S. 135, 157;
> *Budd* v. *New York,* 143 U. S. 517, 532;
> *People* v. *Nebbia,* 262 N. Y. 259, 264, 265.

We submit, therefore, that the Legislature has exceeded its constitutional power in enacting a statute which regulates the selling price of ordinary commodities and is applicable to all ordinary businesses.

POINT C.

The means provided by the statute to achieve its purpose are unreasonable, arbitrary and discriminatory, and are wholly inappropriate to any valid legislative purpose.

Assuming—but not conceding—that the statute is enacted for a valid purpose within the constitutional powers of the Legislature, nevertheless, it provides means of accomplishment so inappropriate to any proper legislative purpose, and permits of such an unreasonable, arbitrary and discriminatory use of power over the liberty and property of citizens, that it is for these reasons alone unconstitutional.

Even a statute enacted for a valid purpose is unconstitutional if, in its operation, it is arbitrary or discriminatory, or if the means adopted to accomplish the purpose are not appropriate to that end. This principle was recognized in *Nebbia* v. *New York*, 291 U. S. 502, 537, 539, where it was said:

> "* * * If the laws passed are seen to have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. * * *
>
> "* * * Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt. * * *"

Further recognition of this same principle is to be found in

Nectow v. *Cambridge*, 277 U. S. 183;
Adams v. *Tanner*, 244 U. S. 590;
Burns Baking Co. v. *Bryan*, 264 U. S. 504;
Weaver v. *Palmer Bros. Co.*, 270 U. S. 402;
Schlesinger v. *Wisconsin*, 270 U. S. 230;
Liggett v. *Baldridge*, 278 U. S. 105;
Yick Wo v. *Hopkins*, 118 U. S. 356;
Washington v. *Roberge*, 278 U. S. 116.

1. *The means adopted by the Legislature to achieve its purpose are unreasonable, arbitrary and discriminatory.*

The challenged statute unconstitutionally vests in private persons arbitrary power to fix the prices at which another

may sell his own property. Private individuals are given unlimited and uncontrolled discretion to fix the selling price of another's property without his consent. The price fixed may be high or low, fair or unfair, reasonable or unreasonable. It may be fixed for any reason or no reason, capriciously or arbitrarily, unwisely, erroneously or maliciously, and with a total disregard for the needs of the retailer's business or the purchasing power of his customers.

The price-fixing power has not been given to any impartial state officer or public body. The statute provides no standard or regulation, and imposes no limit upon the private price-fixing power.* No impartial state officer or body even supervises the price fixed or assures its reasonableness. There is no review by any judicial or administrative body. Private persons are left free and unfettered in the exercise of their discretion over the price of another person's property.

Likwise, the Legislature has given to private persons the unrestrained right to determine whether price-fixing is necessary at all. There is no legislative finding that it is necessary. The Legislature has singled out no specific industry which, for special circumstances as found by the Legislature, requires special regulation. By this statute a private person may fix prices when, and as, he wills, or he may refrain from doing so.

Not only has the Legislature given to private persons the power to determine when prices shall be fixed and how they

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* As indicative of the powers asserted by producers and wholesalers under these statutes, see *Coty* v. *Hearn Department Stores, Inc.*, 158 Misc. (N. Y.) 516, 525, 526, Rosenman, J.:

> "In fact, the contract annexed to the complaint herein permits the producer [Coty] 'from time to time in its sole discretion to revise such minimum resale prices and provides that such revised resale prices shall become effective at such time as specified by Coty, which shall be at least three days after Coty shall have mailed a notice of such revision to the retailer.'"

In *Seeck & Kade, Inc.* v. *Tomshinsky*, 269 N. Y. 613, the Record on Appeal, p. 17, shows that the contract provided:

> "Manufacturer may at any time, or from time to time, in its sole discretion, revise minimum resale prices and such revised resale prices shall be effective, unless otherwise specified by Manufacturer, ten days after Manufacturer shall have given notice thereof to Retailer."

Under the statute these resale prices bind not only those who assented to them, but all other retailers who know about them.

shall be fixed, but it has likewise vested in such private persons arbitrary power to enforce the statute or not to enforce it as they, in their uncontrolled discretion, decide. Non-observance of the fixed prices is not made a crime, and no public body is authorized to compel observance of the fixed price. The remedy provided by the statute is an action for damages or a suit for injunction at the behest of private persons. These private persons may enforce the statute against one retailer and not against another. Their reasons for doing so may be capricious or even malicious. One retailer may have his prices fixed so that he cannot compete with numerous other retailers who may not be coerced into observance of the fixed price.

Furthermore, the statute by empowering a manufacturer or wholesaler contracting with a competing retailer to fix the price that another retailer may charge for his own property, has enabled private persons to nullify completely the economic advantage which a retailer may enjoy because of superior efficiency, low rent, volume, buying power, cash selling, etc. The statute permits private persons to destroy that which may be the retailer's most valuable asset, to wit, his good will resulting from superior efficiency, and his customers' approval and confidence in his method of doing business built up by years of effort and financial outlay. In many cases a retailer's chief appeal to his customers is a price appeal. He is able to sell for less because of efficiency, low overhead and his election not to provide the elaborate services which other stores provide.

To give to private persons the power to compel uniform prices is to give them the power to compel certain retailers to sacrifice their customers to other stores with more elaborate services and facilities—and this, to the detriment of the retailer and the consumer who will ultimately be obliged to pay for these frills of merchandising, whether he desires them or not.

A state legislature cannot constitutionally give to private persons such unlimited power over the liberty and property of other persons as this statute attempts to give them. The power is too unrestrained and too susceptible of abuse.

Very recently in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311, 80 L. Ed., Adv. Ops., 749, 769, this Court condemned a similar delegation of Federal legislative power to private individuals as violative of the Fifth Amendment. There it was held that a majority of the members of a single distressed major industry could not constitutionally be vested with power to regulate the affairs of an unwilling minority. The Court stated:

> "The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than to refer to the decisions of this court which foreclose the question."

Here, the delegation does not even pretend to have the justification of saving a paramount industry in a depressed condition. Under this statute the price of any branded commodity may be fixed by a single contract between a manufacturer or wholesaler and a retailer, and all other retailers who deal in that commodity (even competitors of the contracting retailer) are bound by the statute to observe the price so fixed. To quote again the language of the *Carter* case: "This is legislative delegation in its most obnoxious form."

This Court has also condemned as violative of the due process clause of the Fourteenth Amendment state statutes which, like the challenged statute, have attempted to delegate to private individuals broad powers over the liberty and property of other persons.

> *Eubank* v. *Richmond*, 226 U. S. 137;
> *Washington* v. *Roberge*, 278 U. S. 116.

See also:

> *Yick Wo* v. *Hopkins*, 118 U. S. 356;
> *Doubleday Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272.

We submit, therefore, that under our Constitution, a state legislature cannot delegate to private persons unrestricted

power over the liberty and property of others. It is just such a delegation that the instant statute has attempted, and because of that attempted delegation the statute is invalid.

Not infrequently the proponents of legislation like that here attacked have argued that competition between brands will prevent unreasonable exercise of the power delegated to private persons. They assert that no one will fix too high a price for his branded products because they must compete with other branded products of the same general class.

To this argument there are several conclusive answers:

First, the argument ignores the basic fact of retailing. Retail prices are determined by competition in distribution, not by competition between brands. Retail prices in a free market reflect the cost of distribution and the services furnished by the retailer to the consumer even more than the original cost of the goods sold. More than 50 per cent. of the average consumer's dollar goes to cover distribution costs.*

Retail distribution costs vary greatly as between businesses of different types, between businesses of the same type, between different communities, and between different sections of the same community. A retailer who extends long-term credit, who has an expensive location, who exchanges goods freely, who has elaborate facilities and services and highly trained sales people must charge more for the same sort of merchandise than a retailer who operates a less elaborate store on a cash-and-carry basis, who has a small overhead and who furnishes fewer services. Similarly, an efficient retailer who does a large volume of business may be able to sell the same merchandise cheaper than a smaller type of retailer who is less efficient and who does a smaller volume of business. In the absence of artificial restrictions the price which the consumer pays is higher if the particular retailer with whom he deals has a high distribution cost.

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* Professor Paul D. Converse of the University of Illinois, *Elements of Marketing*, p. 5.

The retailer is not a mere standardized vending machine. The price which a consumer pays for an article which he purchases is not merely for the article alone, but also for the services and facilities which go with it.

Hence, we say that competition between brands cannot determine retail prices. The delegation of price-fixing power effected by the challenged statute must inevitably subject the retailer to arbitrary and capricious action by private individuals, for it gives those individuals complete power over the retailer's charges for his distributional services. This power may deprive a retailer of the good will which he has acquired over many years as a result of giving his customers the best possible goods for the least money by reason of superior efficiency and an economical method of doing business.

From the consumer's point of view the statute puts into the hands of private persons the power to eliminate all of the savings of efficient distribution and to compel the consumer to pay for inefficient operation and for services which he cannot afford and, therefore, does not desire.* This statutory discouragement of efficient distribution ultimately means higher distribution costs and, therefore, higher retail prices. "It is upon the consumer that the real burden of price-fixing falls."†

Secondly, the argument does not meet the possibilities of arbitrary enforcement of this statute by private individuals against some retailers and not against others.

Thirdly, the argument overlooks the fact that if a manufacturer or wholesaler, because of ignorance, mistake or malice, fixes an unfair price, it is the retailer and the consumer who must bear the injury of the price maladjustment.

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*See Federal Trade Commission, *Report on Resale Price Maintenance*, Part II [1931], p. 160.

†Professor Paul H. Nystrom of Columbia University, *Dangerous Trends Under the N.R.A.*, p. 8. See also Federal Trade Commission, *Report on Resale Price Maintenance*, Part II [1931], p. 165.

Even if the most benevolent motives are attributed to the delegees of the price-fixing power, they cannot possibly have the wisdom and the foresight to fix a price which is fair to retailers and consumers under all of the diverse conditions of retail merchandising. They cannot possibly know the internal requirements of a particular retailer's business or when he must reduce his prices in order to raise cash to meet payrolls, taxes, interest, etc. They cannot possibly know the varying costs of the thousands of retailers throughout the state, and hence they cannot fix a price which takes due cognizance of those varying costs.

Fourthly, the whole theory that competition among competing brands will automatically fix the proper price level for each brand is inimical to the very argument upon which the proponents of price-fixing rely to show the need for any price-fixing statute. On the one hand, these persons say that the public is unable to ascertain the merit of merchandise and consequently is misled and overcharged on certain goods because of price-cutting on other goods.* When speaking for a different purpose, these same price-fixing proponents say that the public will, of itself, discriminate between various brands so that, if the price of one brand is raised, public patronage will switch to other brands. The inconsistency of these avowals of concomitant wisdom and ignorance on the part of the consumer remains one of the great mysteries of the price-fixing philosophy.

Finally, brands are often adopted and advertised for the very purpose of avoiding competition with other brands. The success of a brand and of the advertising campaigns in connection with a brand lies in its ability to take the branded articles out of competition with other articles.

While it is true that the price of a can of Pyroil may not be raised to $100 and still compete with a similar oil selling for $1.50, it is not true—in the absence of price competition—

* Professor F. W. Taussig of Harvard University, in an article entitled "Price Maintenance" in the *American Economic Review*, Supplement Vol. VI, No. 1, points out that there is little reason to believe that the public is so gullible. The merchant who cuts prices "does not ordinarily outwit or defraud the purchaser; he enlarges his scale of operations and brings down his overhead charges."

that the price of Pyroil might not be raised, say to $2 or $2.50 and still compete with other oils if a sufficiently vigorous advertising campaign were undertaken.

We submit, therefore, that actual or supposed competition between brands notwithstanding, no legislature can constitutionally give to private persons the power to fix the selling price of other persons' property.

2. *The means adopted by the Legislature in the challenged statute are wholly inappropriate to any constitutional legislative purpose.*

Despite statements and inferences to the contrary in the opinions and arguments below, more is required to sustain a legislative curtailment of liberty and property than a mere legislative finding that some evil exists and the adoption of some means of eliminating the supposed evil. There are constitutional limits beyond which a legislature may not go.

Democracy itself—like free competition—has some evils. Such evils, however, do not furnish justification for legislation abolishing democracy and substituting for it monarchy, communism, or fascism. Such legislation might abolish some of the evils of democracy—but it would also transgress the Constitution.

Even a statute for a valid constitutional purpose is unconstitutional if the means adopted are not reasonably appropriate to achieve that purpose. The promotion of child welfare and education, the encouragement of patriotism, and the prevention of race conflict are all valid legislative purposes. A statute requiring all children to be taken from their parents and reared by official guardians might produce a stronger and a better-educated population and more useful citizens. A statute prohibiting sales of residential property in certain localities might prevent race conflict by keeping white people and negroes apart. Yet, we know that such statutes would be unconstitutional under our system of government as depriving persons of liberty and property without due process of law.

See:

Meyer v. *Nebraska*, 262 U. S. 390;
Pierce v. *Society of Sisters of the Holy Name*, 268 U. S. 510;
Buchanan v. *Warley*, 245 U. S. 60.

The statute here challenged shows no legislative finding or statement as to the statutory purpose. The appellee's allegation that the statute was passed to remedy the evils thought to flow from "leader" and "loss leader" merchandising is patently nothing but a pleader's characterization of the statute. The statute says nothing about "leaders" or "loss leaders." It strikes at all price reduction below the price arbitrarily fixed by private persons. It does this regardless of the degree of the reduction and regardless of its economic justification. The only purpose, which can be ascertained from the language of the statute and from its operation and effect, is to give to manufacturers and wholesalers the absolute power to fix the resale prices of other persons' property and to prevent anybody for any reason from selling his own property for less. The real purpose, we submit, is the result effected by the statute.

Since the Legislature has made no finding as to the evil sought to be remedied and has made no statement as to the purpose of the statute, we consider certain supposed evils which have been at various times decried by the price-fixing interests and the relevancy of the statute thereto.

(a) If it be assumed that the prevention of the use of "loss leaders" is the purpose of the statute, the means adopted are wholly inappropriate to that purpose.

The term "loss leaders," we assume from appellee's complaint, means selling goods at a loss for the purpose of attracting customers to buy other goods at sufficiently high prices to offset the loss.

There is no charge in this case that the appellant has ever sold any merchandise at a loss or for the purpose of attracting customers to other merchandise through the sale of which appellant will make up that loss. From all that

appears in the instant record, the appellant has done no more than sell its own merchandise at a lower price than is desired by the appellee and at prices profitable to the appellant, fair to its customers, justified by its cost of doing business and required by its own cash needs and local competitive conditions.

The advocates of price-fixing attack price competition by the use of invective and question-begging phrases like "loss leaders" and "predatory price-cutting."* They have greatly exaggerated the supposed evils of these practices† in order to freeze prices at levels to their own advantage. This method of approach serves to obscure the real purpose of the price-fixing proponents who want, not so much to abolish "loss leaders," as to fix the one and absolute price at which all retailers must sell and thus abolish or at least lessen retail competition.

Quite obviously, selling below the price fixed by the appellee is not synonymous with "loss leader" merchandising. A cash store can sell for less than a credit store, and it is its right and, indeed, its economic duty to do so. Similarly, an efficient store can, and ought to, sell for less than an ineffi-

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* "Price-cutting" is merely a phrase to describe "any form of price competition regarded as objectionable by the user of the term."

"In its broadest sense it covers any competitive act or practice that tends to result in lower prices or prevents the maintenance or enhancement of prices" (Federal Trade Commission *Report on Resale Price Maintenance*, Part II [1931], p. 9).

"The loss leader problem is one of those far too frequently discussed with easy assumptions and with a utilization of question-begging words playing the role of facts and analyses" (Brookings Institute, *The National Recovery Administration*, pp. 600, 601).

See also *Income and Economic Progress* (Moulton, 1935, The Brookings Institute), pp. 118, 133-136, 153-162.

† The Federal Trade Commission reported after an exhaustive investigation (*Report on Resale Price Maintenance*, Part II [1931], pp. 4, 162):

> "The Commission has been at some pains to find instances of such price cutting which were sufficiently severe to result in a permanent and material reduction of the manufacturer's volume of business, but without discovering any instances in which it could be satisfactorily shown that the decreased volume was primarily due to dealer price cutting. The reports received from dealers regarding their purchase prices and selling prices very rarely show selling prices below the purchase prices."
>
> "No instance has yet been brought to the Commission's attention in which there was conclusive evidence that an article of real merit had been driven off the market by price cutting alone."

cient competitor. Heretofore, it has been regarded as perfectly proper and highly beneficial for a retailer to pass on to his customers the savings due to his efficiency and his method of operation.

If "loss leaders" are an evil, as appellee claims, certainly the statute under consideration goes beyond constitutional limits in combating that evil. Under this statute the price fixed need have no relation to cost or loss, and it need have no relation to the retailer's reason for desiring to fix the selling price of his own property. Private persons may under the statute fix the resale price of another's property at whatever level they arbitrarily select and may prohibit a retailer from selling at 100 per cent. profit if they think he should exact a profit of 200 per cent. The fairness, *bona fides* and economic justification of selling at the lower price are irrelevant considerations.

Even if the prohibition of "loss leaders" is assumed to be a valid purpose, the Constitution does not permit the means of suppression enacted by the challenged statute. This statute condemns all price reduction provided only that the goods bear any sort of name or brand and strangers have made a single contract as to such goods.

The Legislature cannot ignore "the righteous distinction between guilt and innocence." It cannot fix "a resale price where evils are absent as where they are present." "It is not permissible to enact a law which spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers may also be caught." (*Tyson* v. *Banton*, 273 U. S. 418, 442, 443.)

Similar views were expressed by this Court in *Adams* v. *Tanner*, 244 U. S. 590, 594, 595, and in *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 9, 10.

The New York courts have likewise held that legislation cannot proscribe honest dealing and fair competition under the guise of prohibiting dishonest and fraudulent practices.

People ex rel. Moskowitz v. *Jenkins*, 202 N. Y. 53, 58, 59;

People v. *Gillson*, 109 N. Y. 389, 399.

Accordingly, we submit that the Legislature, even assuming that it sought to prevent the use of "loss leaders," has exceeded the constitutional limits of its powers for it has sought to compel all retailers to sell their own property at prices fixed by another. Such a broad prohibition of honest and beneficial business is not an appropriate means of ensnaring a few supposed wrongdoers. Indeed, merely selling one's property below cost is not necessarily an economic evil* and we doubt that it can be made *per se* illegal.

(b) If it be assumed that the prevention of predatory price-cutting (meaning thereby price-cutting with the deliberate intent of injuring other persons) is the real purpose of this statute, the means adopted are wholly inappropriate to that purpose.

It is not such predatory price-cutting that is condemned by the statute. The statute applies indiscriminately to all sales of all branded commodities knowingly made at a lower price than that fixed by some manufacturer or wholesaler. Under this statute the retailer's intent and motive in selling below the price so fixed are wholly immaterial. A retailer cannot, without risk of serious liability, sell for less than the price so fixed, although the lower price at which he desires to sell yields him a fair profit, is adopted with the best possible motive, and is a fair market price, honestly resulting from his efficiency and economical operation and the play of competitive forces.

Even though a statute prohibiting price-cutting for the deliberate and definite purpose of injuring others might be valid, this statute which prohibits selling below the price arbitrarily fixed by private persons cannot be upheld. This is shown by a comparison of *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, and *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157.

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*"It is a well-known business fact, however, that there are conditions in which business men find it profitable for a time to sell below their costs—even their direct costs—even though they have no hope of thereby attaining a monopoly position. During periods of depression, for example, nothing is more common than business men selling below cost 'to stay in the business picture.' Far from hoping to attain a monopoly, they hope merely to stay alive" (*The National Recovery Administration*, Brookings Institute, p. 593).

In the latter case this Court upheld the constitutionality of a South Dakota statute prohibiting local price discriminations "for the purpose of destroying competition of any regular, established dealer in such commodity or to prevent competition of any person who, in good faith, intends to become such dealer."

In the *Fairmont Creamery* case this Court held invalid a Minnesota statute prohibiting price discriminations without regard to the motive or intent behind it. This difference between the South Dakota statute in the *Central Lumber* case and the Minnesota statute in the *Fairmont Creamery* case was sufficient to invalidate the latter.

Like the Minnesota statute, the statute here challenged applies irrespective of motive or intent of the person accused of selling his own property at his own price.

To avoid this principle the appellee may assert that in this case the appellant is charged with price-cutting "for the purpose of interfering with and disrupting plaintiff's [appellee's] said contracts and business" (R. 4). This is no answer to our argument.

Under the plain language of the statute, it is unnecessary to plead or prove any such purpose to invoke the statutory remedies, and intent and motive have nothing to do with the case. Appellee's allegation notwithstanding, the constitutionality of the statute must be judged by its effect and by the possibilities of what may be done under it.

> *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 11;
> *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 708, 709;
> *Eubank* v. *Richmond*, 226 U. S. 137, 144;
> *Bailey* v. *Alabama*, 219 U. S. 219, 235, 238, 244, 245.

We note also that appellee's allegation is not the equivalent of an allegation of spite, malice or intent to injure or destroy competition. All competition—even the fairest—is, in a sense, for the purpose of "interfering with" or "disrupting" someone's business. As was said by the Circuit Court of

Appeals in *Sinclair Refining Co.* v. *Federal Trade Commission*, 276 Fed. 686, 687, 688 (aff'd 261 U. S. 463):

> "Competition is not an unmixed good. It is a battle for something that only one can get; one competitor must necessarily lose. The weapons in competition are various. Superior energy, more extensive advertising, better articles, better terms as to time of delivery, place of delivery, time of credit, interest or no interest, freights, methods of packing, lower prices, more attractive and more convenient packages, superior service, and many others, are and always have been considered proper weapons. Expense attending the use of any weapon, the foolishness of it, the fact that a method is uneconomical, or that the competitor cannot meet any method or scheme of competition because it will be ruinous to him to do so, have not, nor has either of them, ever been held unfair. Such things are a part of the strife inherent in competition. Some merchants sell and deliver goods at the counter and you must take them away; others deliver them at your house, or in any town, state or country—that is merely a part of the bargain. Some people deliver a hat in a bag at the store; others deliver it at your house in a fancy box that is used by many purchasers as a container."

Any vigorous competition by the appellant with the appellee's customers is for the purpose of obtaining business. In the absence of monopoly no one merchant can have all of the business. Competition presupposes that a customer gained by one merchant is lost at least for a time to another. Any such competition might lead the appellee's customers to regard the restrictive price fixing contracts which they have with the appellee as undesirable or as financially onerous. In this sense—and in this sense only—has the appellant's competition been for the purpose of "disrupting" or "interfering with" the appellee's contracts and business. But such language does not allege legal wrong unless the statute is a valid restriction on competition.

Under the holding of this Court in the *Fairmont Creamery* case, a state legislature, under the guise of eliminating preda-

tory price-cutting, cannot eliminate all price competition. The challenged statute does eliminate all fair price competition, and it is, therefore, unconstitutional.

(c) If it be assumed that the prevention of unfair competition is the purpose of the statute, the means of preventing such practices are inappropriate to the purpose.

> "Unfairness in competition has been predicated upon acts which lie outside the ordinary course of business and are tainted by fraud or coercion or conduct otherwise prohibited by law." (*Schechter Poultry Co.* v. *United States,* 295 U. S. 495, 532.)

If the challenged statute is really aimed at the suppression of unfair competition, it has adopted means most inappropriate to achieve that purpose, for it condemns all price competition whenever some manufacturer or wholesaler so commands, and only then. The statute says in effect that no retailer may sell branded goods which he owns at less than the price fixed by another although those goods are genuine and although there is no fraud, coercion, counterfeiting, passing off, slander, dishonesty or, indeed, anything outside the ordinary course of business or prohibited by law. All retail price competition in all branded goods is declared to be "unfair" if a manufacturer or wholesaler does not want such competition to continue.

Can the Legislature suppress honest and fair competition merely by labeling it "unfair"? If it cannot, this enactment destroys liberty and property without due process of law as the cases hereinbefore discussed amply show.

It is wholly immaterial that the Legislature has declared that selling one's own property below the price arbitrarily dictated by another is unfair competition. Selling one's own goods below a price fixed by a manufacturer or a wholesaler is not unfair competition, and no legislative declaration can, with due regard to the Constitution, make it unfair competition.

The legislative purpose and the means adopted by the Legislature to achieve that purpose are always subject to judicial scrutiny. If the purpose be not a valid one, or even if valid, if the means adopted to achieve that purpose are unreasonable, arbitrary or discriminatory, or if they are inappropriate to a proper constitutional purpose, the courts may so declare,—whatever language the Legislature may have used.

Wolff Packing Co. v. *Court of Industrial Relations,* 262 U. S. 522, 536;
Home Building & Loan Association v. *Blaisdell,* 290 U. S. 398, 442.

See also:

United States v. *Butler,* 297 U. S. 1.

Not infrequently legislatures have sought to justify price regulation of ordinary commodities and the suppression of free and fair competition by declaring that such regulation is a means of achieving a valid statutory purpose. This Court on several occasions has looked through the legislative declaration and has held that the Legislature could not by this method deprive citizens of their constitutional rights of liberty and property.

In *Williams* v. *Standard Oil,* 278 U. S. 235, the Court held unconstitutional a state statute attempting to fix the price of gasoline although the Legislature declared that the regulation was to prevent unfair and improper trade practices and that the gasoline business was affected with a public interest.

Again, in *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1, this Court held unconstitutional a state statute attempting to make the price of dairy products as fixed by a single transaction the uniform price throughout the state, although the Legislature declared that the regulation was for the purpose of preserving free competition.

Similarly, this Court has condemned price-fixing statutes although the Legislature has declared that the business sought to be regulated was affected with a public interest.

Wolff Packing Co. v. *Court of Industrial Relations,* 262 U. S. 522;
Tyson v. *Banton,* 273 U. S. 418.

See also:

New State Ice Co. v. *Liebmann,* 285 U. S. 262.

In *People* v. *Gillson,* 109 N. Y. 389, the proponents of the legislation there challenged sought to support it as a means of preventing fraud and adulteration of food and argued that no one could sell food for less than his competitors and at the same time deal honestly. The New York court, while recognizing that the Legislature had power to prohibit the adulteration of food, rejected the argument and condemned the statute as unconstitutional. The court pointed out that giving gifts or selling for less than certain competitors is not dishonest and "may simply be the old story of a small profit on large sales instead of a large profit on small sales," and that the effect of the statute was not to preserve fair competition, but to eliminate competition and destroy constitutional rights.

These cases show that the Legislature cannot, by the use of an epithet, enlarge its own powers so as to deprive citizens of liberty and property without due process of law.

The statute here challenged in fact forbids honest dealing and the honest use of one's own property. It has no relation to anything that has ever been understood to be embraced within the term "unfair competition."

(d) If it be assumed that the purpose of the statute is to prevent monopoly, the means adopted are wholly inappropriate to that purpose.

In *Doubleday Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.,* 269 N. Y. 272, the proponents of the challenged statute urged that such legislation was necessary to prevent monopoly.

The argument was that since large corporations who distribute their own products at retail through their own agents can, under the decision in *United States* v. *General Electric Co.,* 272 U. S. 476, fix their own retail selling price, *ergo,* every producer should be able to fix the selling price on products made by him and sold to others. In this way it is asserted that large corporations and small business men will be placed on equality.

The argument involves a strange *non sequitur.* The very basis of the *General Electric* case is that a producer who is to invoke the principle of that decision must *bona fide* distribute *his own* products directly to the consumer. He must take all the risks of his own retail distribution but if he *does sell* to other retailers he cannot under that decision fix *their* prices.

A producer who merchandises under the system approved in the *General Electric* case is merely putting his own price on goods which *he owns.* Neither the rationale nor the language of that case permits him to dictate the price on goods owned by others merely because those goods bear a mark, brand or name. Indeed, and especially when read in conjunction with the cases in this Court condemning resale-price-maintenance agreements as violative of the Anti-Trust Laws, the *General Electric* case requires that price-fixing be limited to one's own property and forbids the extension of price-fixing power even by agreement over property owned by others. This is true whether or not the property bears a trade-mark, brand or name.

John D. Park & Sons Co. v. *Hartman,* 153 Fed. 24;
Dr. Miles Medical Co. v. *John D. Park & Sons Co.,* 220 U. S. 373;
Boston Store v. *American Graphophone Co.,* 246 U. S. 8;
Federal Trade Commission v. *Beechnut Packing Co.,* 257 U. S. 441;
Straus v. *Victor Talking Machine Co.,* 243 U. S. 490;
Bauer v. *O'Donnell,* 229 U. S. 1;
Bobbs-Merrill & Co. v. *Straus,* 210 U. S. 339.

It is one thing for the law to permit a man voluntarily to fix the selling price of his own property. It is quite another for the law to compel a man to sell his own property at a price fixed against his will by someone else. The Constitution permits both the small merchant and the large corporation to fix the selling price of their own property. It does not permit legislation compelling anyone to sell his own property at a price fixed by another.

Not only does the argument advanced by the proponents of this legislation condemn as monopolistic practices heretofore required by this Court as essential to the maintenance of free competition and the prevention of monopoly, but the statute which they support gives stimulus to any monopolistic practices heretofore enjoyed by large corporations. It does not place small business men on an equality with large corporations; it merely permits the large corporations to fix not only selling prices of their own property but the selling price of property owned by others—and this, without assuming any of the risks incidental to retail distribution.

Perhaps the merchandising practices of the General Electric Co. are an evil. If so, they may be dealt with by proper legislation. The fact that certain evils are found in the practices of big corporations does not permit the Legislature to deprive innocent citizens of their liberty and property without due process of law.

We submit Section 1½ of the challenged statute is unconstitutional as depriving retailers of liberty and property without due process of law

(1) because the Legislature is without constitutional power to enact a general price-fixing statute applicable to all ordinary commodities dealt in by ordinary businesses; and

(2) because the means adopted by the challenged statute are arbitrary, discriminatory and inappropriate to any valid legislative purpose.

POINT D.

The decision of the court below is based upon a misapplication of *Nebbia* v. *New York*, 291 U. S. 502, and upon a misunderstanding of *Doubleday Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272.

1. *The Misapplication of the* NEBBIA *Case.*

The opinions of the court below in the instant case and in the related case of *Kunsman* v. *Max Factor & Company* show that the statute was upheld as a valid exercise of police power, mainly upon the supposed authority of the *Nebbia* case. The court below erred in so holding, for, we submit, the *Nebbia* case does not in fact support the challenged statute or any similar statute.

The learned opinion of Mr. Justice Rosenman in *Coty* v. *Hearn Department Stores, Inc.*, 158 Misc. (N. Y.) 516, 529-531, rejecting the argument that the *Nebbia* case upheld the constitutionality of a New York statute identical in language with the California statute here challenged, so clearly points the distinction between the *Nebbia* case and the instant case that we believe quotation is justified:

> "The plaintiff relies chiefly upon the *Nebbia* case (*People* v. *Nebbia*, 262 N. Y. 259; *Nebbia* v. *New York*, 291 U. S. 502; 54 S. Ct. 505; 78 L. Ed. 940; 89 A. L. R. 1469). It is true that there is language in the *Nebbia* case which, ripped from the context of the opinion and divorced from the facts involved, might give some substance to the plaintiff's contention. The facts in that case, however, bear no resemblance to the present one.
>
> "In that case: (1) There were legislative findings of fact based upon a complete and thorough legislative investigation. (2) The enactment was effective only during the prescribed period of a short emergency, which was declared by the Legislature to exist. (3) The fixing of prices was related to one commodity only—milk. (4) The price of milk was to be fixed by a governmental agency after hearings, and was to be subject to judicial review by certiorari. (5) The legislative findings of fact upon which the statute was based were as follows: (a) That milk was an essen-

tial item of diet of all the People of the State; (b) that the absence of proper safeguards of such product would lead to the spread of disease; (c) that proper and adequate safeguards were being threatened in the State of New York because of existing insufficient return to milk producers; (d) that the milk industry was a paramount industry of the State and that the maintenance of it was vital to the credit and economic structure of the State; (e) that the financial structure of the industry was in danger because of certain conditions and various enumerated factors of instability peculiar to the industry itself. (6) The statute was admittedly passed as a health measure under the recognized limitations of the police power. (7) Prosecution and enforcement were lodged with the State authorities.

"Each of the above itemized facts present in the *Nebbia* case indicates a radical difference from the case at bar. A mere statement of the differences should suffice to indicate that the holding of the court in the one is in no way controlling upon the legal conclusions in the other.

"It is true that in the *Nebbia* case the Supreme Court of the United States did not require in terms that the commodity be 'affected with a public interest.' That ancient expression was defined anew in the opinion of the court (291 U. S. 502, at p. 536; 54 S. Ct. 505, 516; 78 L. Ed. 940; 89 A. L. R. 1469) as a phrase which 'can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good.' There is implicit in any definition of the phrase, however, the requirement that there be such relationship between the business and the public welfare that governmental interference with the private property and rights involved will be justified in spite of the due process clauses.

"It cannot be contended that the *Nebbia* case is authority for the proposition that the prices of ordinary commodities may, without more ado, be fixed by the Legislature, much less by private individuals. Our Court of Appeals pointed out in *Darweger* v. *Staats* (*supra*) that the *Nebbia* case was not such authority, even if an emergency were declared to exist, and even if the price-fixing power were limited to the period of the emergency. The court stated: 'The briefs place

much emphasis upon *Nebbia* v. *New York* (291 U. S. 502) & *People* v. *Nebbia* (262 N. Y. 259), and claim that this is an authority to sustain legislation fixing the price of any commodity— shoes, clothes, coal, hardware or anything else that may strike the Legislature's fancy, provided an emergency be declared. The fixing of the price of milk in the *Nebbia* case was a mere incident to other regulations which tried to meet an abuse growing up to the detriment of the farmer and his stock. This control of the output protected the very vitals of the industry, and it would not have been a far step to have held, as perhaps it was intimated, that the milk industry was one touched with a public interest, such as water, electricity, grain and the like. To say that the *Nebbia* case is an authority for the Legislature to fix the prices of all commodities is not justified by the decision. What the legislative power may be in a given case regarding any industry we do not undertake to say. Sufficient unto the day is the power thereof.'

"Although somewhat different phraseology was used by the courts in sustaining legislation fixing the price of milk, still 'it would not have been a far step to have held, as perhaps it was intimated, that the milk industry was one touched with a public interest, such as water, electricity, grain and the like.' (*Darweger* v. *Staats, supra.*)"

Surely, the *Nebbia* case does not warrant a delegation to private persons of the power to fix the selling price of ordinary commodities owned by others merely because some manufacturer has put a brand upon such commodities. Surely, the *Nebbia* case does not overrule the many decisions of this Court condemning statutes having the essential features found in the statute here, or overturn constitutional principles long recognized and approved by this Court. Indeed, the constitutional principles approved in the *Nebbia* case, far from sustaining the decision now under review, require its reversal.

2. *The Misunderstanding of the* DOUBLEDAY *Case.*

The court below refused to follow the decision of the New York Court of Appeals in *Doubleday Doran & Co. Inc.* v. *R. H. Macy & Co., Inc.,* in which the New York counterpart (Chap. 976, Laws of 1935) of the California statute here involved had been held unconstitutional.

The California court erroneously distinguished the *Doubleday* case upon the following grounds:*

(a) That the contract by which the plaintiff in the *Doubleday* case purported to fix the price of the commodity sold was between parent and subsidiary corporations, whereas in the California cases such was not the fact.

(b) That the plaintiff in the *Doubleday* case voluntarily sold such commodities to the defendant without obtaining from the defendant any agreement as to price reduction, whereas in the California cases the plaintiffs refused to sell to the defendants without agreement for price restriction and the defendants obtained goods elsewhere.

(c) That the plaintiff in the *Doubleday* case showed but a single contract, whereas the plaintiffs in the California cases showed "a uniform system of contracts applied generally to wholesale and retail distributors in the state."

The court in the *Doubleday* case did not base its decision upon any such narrow factual grounds as are asserted by the court below, but upon established constitutional principles long recognized and applied by this Court. In support of its decision the Court of Appeals cited, *inter alia, Williams* v. *Standard Oil Co.,* 278 U. S. 235; *Tyson & Bro.*

* The Illinois court in *Joseph Triner Corp* v. *McNeil,* 363 Ill. 559 (now on appeal to this Court), quoted with approval the California court's supposed distinction of the *Doubleday* case. The criticism of the California case is applicable also to the Illinois case.

v. *Banton*, 273 U. S. 418; *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522; *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, and *Nebbia* v. *New York*, 291 U. S. 502.

If there is any doubt about the view of the New York Court of Appeals as to the constitutionality of the statute applied to facts like those present in the instant case and the *Max Factor* case, that doubt is removed by the decision in *Seeck & Kade, Inc.* v. *Tomshinsky*, 269 N. Y. 613. In that case (which was argued and decided with the *Doubleday* case) the Court of Appeals, upon the authority of the *Doubleday* case, held the New York statute to be unconstitutional although every fact which the California court counts upon to distinguish the *Doubleday* case was present.

The record of the *Seeck & Kade* case in the New York Court of Appeals shows*

(a) that the contracts relied upon by the plaintiff to fix the resale prices of the commodity bearing the plaintiff's trade-mark were not made with the plaintiff's subsidiary, but with numerous retail dealers in the State of New York (p. 10);

(b) that a price-maintenance contract was tendered to the defendant by the plaintiff (p. 11); that the defendant refused to execute such contract (p. 11); that the defendant did not purchase the goods which it offered for sale at a reduced price from the plaintiff or the plaintiff's distributors, but from other persons (p. 12); and

(c) that the plaintiff, for the purpose of availing itself of the provisions of the Fair Trade Act, entered into uniform contracts fixing the resale price of its goods, and numerous retailers in the State of New York executed such contracts (p. 10).

* Page references are to record in New York Court of Appeals.

We submit that the supposed distinctions made by the court below in rejecting the *Doubleday* case do not exist.

The Court of Chancery of New Jersey, in holding the New Jersey counterpart of the challenged statute to be unconstitutional, expressly rejected the reasoning of the California cases and quoted with approval the opinion in the *Doubleday* case.

> *Johnson & Johnson* v. *Weissbard*, N. J. Eq. , 184 Atl. 783.

Similarly, the Circuit Court of Wisconsin, in holding a similar Wisconsin statute unconstitutional, has expressly rejected the California cases and has approved the *Doubleday* case.

> *Archie Widener, Inc.* v. *Goldman* (Wisconsin Circuit Court [Breidenbach, J.], Milwaukee County No. 149,435, decided April 24, 1936 [not reported]).

See also:

> *Weco Products Co.* v. *Reed Drug Co.* (Wisconsin Circuit Court [Gehrz, J.], Milwaukee County No. 150,371, decided July 31, 1936 [not reported]);
> *Milwaukee Co.* v. *Reed Drug Co.* (Wisconsin Circuit Court [Aarons, J.], Milwaukee County No. 148,586, decided April, 1936 [not reported]).

CONCLUSION.

For the reasons stated, we believe that the challenged statute deprives persons of liberty and property without due process of law. We respectfully submit that the decision of the Supreme Court of California upholding the constitutionality of the statute should be reversed.

Respectfully submitted,

LEON LAUTERSTEIN,
MELBOURNE BERGERMAN,
Counsel for R. H. Macy & Co., Inc.,
as *amicus curiae*.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 79

CLARENCE G. KUNSMAN, APPELLANT,

vs.

MAX FACTOR & CO., AND SALES BUILDERS, INC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED MAY 25, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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IN SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

No. 363006

MAX FACTOR & Co., a Corporation, and SALES BUILDERS, INC., a Corporation, Plaintiffs,

vs.

CLARENCE G. KUNSMAN, JOHN DOE, JANE DOE and THE BLACK CORPORATION, a Corporation, Defendants

AMENDED COMPLAINT—Filed January 2, 1934

Come now the plaintiffs in the above entitled action, and for cause of action against the defendants, allege:

I

That the plaintiff Max Factor & Co. now is and at all times since on or about the 1st day of January, 1929, has been a corporation duly organized and existing under and by virtue of the laws of the state of Delaware, United States of America, and authorized to do business as a foreign corporation in the state of California, and having its principal office and place of business in the city of Los Angeles, county of Los Angeles, state of California.

II

That the plaintiff Sales Builders, Inc., now is and at all times since on or about the 7th day of October, 1927, has been a corporation duly organized and existing under and by virtue of the laws of the state of Nevada, United States of America, and authorized to do business as a foreign corporation in the state of California, and having its principal office and place of business in the city of Los Angeles, county of Los Angeles, state of California.

III

That the true names of the defendants, John Doe, Jane Doe and the Black Corporation, a corporation, sued herein under fictitious names are unknown to plaintiff, and when such true names are ascertained, plaintiffs will ask leave of court to amend this complaint and insert them herein.

[fol. 3]

IV

That the plaintiffs are informed and believe, and therefor allege that The Black Corporation, now is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the state of California.

V

That for many years prior to the 1st day of January, 1929, one Max Factor, was a manufacturer of cosmetics and toilet articles, in the state of California. The said Max Factor did adopt certain trade-marks for the said cosmetics and toilet articles manufactured by the said Max Factor. That the said trade-marks were registered according to the laws of the United States of America, at the Patent Office of the United States of America, Washington, D. C., and the said Max Factor was granted the exclusive ownership and right to use the said trade-marks in the United States of America. That said trade-marks, and the number of the certificates issued by the United States of America, and the date of the issuance, are as follows:

Trade Marks	United States Patent Office Certificate Number	Date Certificate Was Issued
Brillox	192,086	March 1, 1924
Max Factor's Supreme and Shield	221,654	December 5, 1925
The Cosmetics of The Stars	240,856	April 10, 1928
Max Factor's	241,483	May 1, 1928
Panchromatic	250,508	December 11, 1928
Pancro	250,507	December 11, 1928
Monotone	259,208	July 23, 1929
Max Factor's Sum'r Tan and Device	263,770	November 12, 1929

Trade Marks	United States Patent Office Certificate Number	Date Certificate Was Issued
Technicolor	265,225	December 17, 1929
X-Scent	292,237	March 8, 1932
Factor	292,325	March 15, 1932
Max	292,646	March 21, 1932
Society	256,865	May 28, 1929

[fol. 4]

VI

That on or about the 1st day of January, 1929, the said Max Factor sold, transferred and assigned the said trade-marks and all of his right, title and interest in and to the same, to the plaintiff, Max Factor & Co. That the said plaintiff, Max Factor & Co., since the said date, continued the manufacture of the said cosmetics and toilet articles theretofore manufactured by the said Max Factor, and has continued the use of the trade-marks adopted by the said Max Factor as heretofore set forth. That the said plaintiff, Max Factor & Co., in addition thereto, adopted two (2) more trade-marks for the said cosmetics and toilet articles manufactured by the plaintiff, Max Factor & Co. That the said trade-marks were registered according to the laws of the United States of America, at the Patent Office of the United States of America, Washington, D. C., and the said plaintiff, Max Factor & Co., was granted the exclusive ownership and right to use the said trade-marks in the United States of America. That said trade-marks, and the number of the certificates issued by the United States of America, and the date of the issuance, are as follows:

Trade Marks	United States Patent Office Certificate Number	Date Certificate Was Issued
Telivision	303,699	June 6, 1933
Brounette	303,694	June 6, 1933

VII

That the said plaintiff, Max Factor & Co., at all times since the said 1st day of January, 1929, has been and still is engaged in the business of manufacturing, for the purpose of selling in all of the states of the United States of

America, and elsewhere, certain cosmetics and toilet articles, among them the following:

Astringent
Bleach Mask
Brillox
Cleansing Cream (all kinds)
Compact (Vanity—all shades)
Compact (Loose Powder)
Eau de Cologne
Eyebrow Pencil (purse-size & regular all shades)
Eyelash Make-Up (all shades)
Eyeshadow (all shades)
Face Powder (all shades)
Face Powder Brush
Hand Lotion
[fol. 5] Honeysuckle Cream
Lip Pomade (all shades)
Lip Stick (Super-Indelible—all shades)
Lip Stick (Waterproof Permanent—all shades)
Make-Up Blender (all shades)
Masque (all shades)
Melting Cleansing Cream
Powder Foundation Cream (all shades)
Rouge (Society & Prof.—all shades)
Rouge Refill (for Vanity—all shades)
Skin & Tissue Cream
Skin Freshener
Vanishing Cream
Theatrical Cold Cream

That the said plaintiff, Max Factor & Co., is the sole owner of the trade-marks hereinbefore described, and has the exclusive right to use the said trade-marks in the state of California, and in all of the states of the United States of America, and the said plaintiff, Max Factor & Co., has at all times since the said 1st day of January, 1929, used the said trade-marks in connection with the manufacture, sale and distribution of the cosmetics and toilet articles hereinabove described. That at all times since the 1st day of January, 1929, the said plaintiff, Max Factor & Co., was and still is the sole owner of the business and good will, in the state of California, and in all of the states of the United States of America, associated with the distribution

and sale of the said cosmetics and toilet articles manufactured by the said plaintiff, Max Factor & Co., and associated with the trade-marks used by it, in said manufacture, sale and distribution.

VIII

That the plaintiff, Sales Builders, Inc., was known as Max Factor Sales Co., prior to on or about January 21, 1930, at which time the name of the said plaintiff was changed to Sales Builders, Inc.

IX

That on or about October 7, 1927, Max Factor as an individual, sold, transferred and assigned to the plaintiff, Sales Builders, Inc., the exclusive right and privilege of distributing and selling in all of the states of the United States of America, including the state of California, the cosmetics and toilet articles then and thereafter manufactured by the said Max Factor, and the good will pertaining thereto, together with the right to use the trade-marks used and/or adopted by the said Max Factor in connection with the said business of distributing and selling, associated with all of the said trade-marks, and the sole right to sell and distribute in all of the states of the United States of [fol. 6] America, the said cosmetics and toilet articles manufactured by the said Max Factor; and the said Max Factor further covenanted and agreed not to sell or ship to any person, firm or corporation, in any of the states of the United States of America, including the state of California, or for sale in any of the states of the United States of America, including the state of California, other than to the plaintiff, Sales Builders, Inc., or on its order, any of the cosmetics and/or toilet articles then or thereafter manufactured by the said Max Factor. That at the time that the said plaintiff, Max Factor & Co., was incorporated, the said plaintiff, Max Factor & Co., assumed and entered into the same covenants and agreements with the said plaintiff, Sales Builders, Inc., that had been entered into theretofore between the said Max Factor, and the plaintiff, Sales Builders, Inc. That at all times since the said 1st day of January, 1929, the plaintiff, Sales Builders, Inc., has been the sole owner of the exclusive right to sell and

distribute in all of the states of the United States of America, including the state of California, all of the cosmetics and toilet articles manufactured by the said plaintiff, Max Factor & Co., and associated with the use of the said trade-marks originally adopted by the said Max Factor and subsequently assigned to the plaintiff, Max Factor & Co., as hereinabove set forth. That the cosmetics and toilet articles specifically set forth in paragraph VII, bear on the labels, attached to the said cosmetics and toilet articles, the trade-marks hereinbefore described. The one (1) trade-mark used principally by the said plaintiff, Max Factor & Co., is "Max Factor's", all of which trade-marks, as hereinbefore set forth are duly registered as such, under the laws of the United States of America, in the United States Patent Office, at Washington, D. C. That the plaintiff, Sales Builders, Inc., as hereinbefore set forth, has the sole ownership of the right to sell and distribute in all of the states of the United States of America, including the state of California, the said cosmetics and toilet articles, so trade-marked, as hereinabove set forth.

X

That the said cosmetics and toilet articles manufactured by the said plaintiff, Max Factor & Co., have been and now are sold and distributed by the said plaintiff, Sales Builders, Inc., generally throughout all of the states of the United States of America, including the state of California, by wholesale and retail druggists, and the said cosmetics and toilet articles enjoy a good reputation and standing among said druggists and the public generally. That the said cosmetics and toilet articles are, and at all times mentioned in this complaint have been, in fair and open com- [fol. 7] petition throughout the state of California with commodities of the same general class produced by others than said plaintiffs or either of them.

XI

That the defendants now are, and at all times hereinafter mentioned were the owners, proprietors and operators of a retail drug store, situated at No. 8802 Wilshire boulevard, in the city of Beverly Hills, state of California, engaged in the sale at retail to consumers of cosmetics and toilet ar-

ticles and other merchandise, which said business is operated under the fictitious firm name and style of Wilshire Drug Co.

XII

That many years ago there developed in the drug trade a practice of cutting prices, both wholesale and retail, of well advertised commodities, well known to the public and sold and identified under distinctive trade-marks, brands and names. That such products were offered by retail dealers at prices conspicuously lower than the marked or established prices of said commodities as so-called "leaders" for the purpose of creating the impression that other goods, of which the prices were not well known, were sold at corresponding reductions, and that all articles dealt in by a particular dealer were sold by him at less than they could be obtained elsewhere. That the stores at which said practices were prevalent became known as "Cut Rate Drug Stores." That said practice of cutting known and established prices engendered a condition by which other dealers were forced to meet the cut prices advertised by their competitors, one cut produced another in retaliation, so that ultimately in a particular community well known articles identified by trade-marks, brands and names with an established price were offered at prices cut to a point which yielded no profit, and in many cases represented a loss. That said price cutting resulted in the destruction of all incentive on the part of dealers to sell such commodities and in their declining to handle or stock the same, and caused said dealers, when said commodities were called for by the public, to sell the same reluctantly, or to substitute, where possible, other products upon which profit could be made. That as a further result of said price cutting, the producer or owner of such identified merchandise whose goods had been handled in this manner, through no fault of his own, was deprived of a market and facilities for distribution, and his business and good-will seriously interfered with and in many cases destroyed. That the situation above described is particularly true in the state of California with respect to cosmetics and toilet articles, and extended gradually to [fol. 8] other lines of merchandise. That to remedy this evil the Legislature of the state of California passed an act entitled "An Act to Protect Trade-mark Owners, Dis-

tributors and the Public against Injuries and Uneconomic Practices in the Distribution of Articles of Standard Quality under a Distinguished Trade-mark, Brand or Name." Said act was approved on May 8, 1931, became effective August 14, 1931, is known as the "Fair Trade Act," and is chapter 278 of the Statutes of California of 1931. That the said "Fair Trade Act" was amended by the Legislature of the state of California, which said amendments were approved on May 8, 1933, and became effective August 21, 1933.

XIII

That on or about the 21st day of August, 1933, plaintiff Sales Builders, Inc., to protect its trade in the state of California, in trade-mark goods, and to protect itself against the injuries and uneconomic practices in the distribution thereof contemplated by the said "Fair Trade Act" hereinabove referred to, and to avail itself of the protection and terms and provisions thereof, did adopt the system of doing business as hereinafter described; that in said system of business written contracts were entered into between the plaintiff, Sales Builders, Inc., and its wholesale or jobbing distributors, and between the plaintiff, Sales Builders, Inc., and the retail druggists, and/or other persons, firms or corporations selling the said products manufactured by plaintiff, Max Factor & Co., hereinabove described, in the state of California. That said wholesale and jobbing distributors are obligated to sell the said plaintiff, Max Factor & Co., products only to retailers who will resell the same at specified prices and who have entered into a written contract with the plaintiff, Sales Builders, Inc., to sell the said plaintiff, Max Factor & Co., products at the said specified prices. The plaintiff, Sales Builders, Inc., has entered into contracts with the retail druggists and other firms, persons or corporations engaged in the retail business of selling cosmetics and toilet articles under the terms of which contracts the said retail dealers are obligated to sell the said plaintiff, Max Factor & Co., products at specified prices. A specimen of the contract entered into between the plaintiff, Sales Builders, Inc., and the wholesale or jobbing distributors is attached hereto, marked Exhibit "A"; a specimen of the contract entered into with the retailers is hereto attached, marked Exhibit "B." That the

prices fixed and established by plaintiff, Sales Builders, Inc., in said contracts are fair and reasonable, and no higher than is required to yield to distributors at wholesale and retail a reasonable compensation for their services. That the goods sold by plaintiff, Sales Builders, Inc., are com- [fol. 9] modities within the terms of the "Fair Trade Act" and bear the trade-marks, brands or names of the said plaintiff, Max Factor & Co., as hereinbefore set forth, and are in fair and open competition with commodities of the same general class produced by others. That practically all the wholesale druggists in the state of California have executed said wholesale distributors' contract, a specimen of which is hereto attached, marked Exhibit "A," and practically all the retail druggists in the state of California have executed said retail distributors' contract, a specimen of which is hereto attached, marked Exhibit "B." That included among said retailers are the prominent department stores dealing in cosmetics and toilet articles. That the said wholesale and retail druggists are observing and conforming with the terms of the said contracts and price cutting on plaintiff, Max Factor & Co., products has ceased, and, except as hereinafter stated, plaintiff, Sales Builders, Inc., is now enjoying, under the terms of the "California Fair Trade Act," a reasonable profit in the sale of its goods and immunity from destructive and uneconomic price cutting, the distribution of its goods has been unobstructed, and its business has been greatly benefited. That the wholesale and retail dealers in said commodities, by reason of such contracts, are obtaining a reasonable compensation and profit on the sale of preparations distributed by plaintiff, Sales Builders, Inc., and they and plaintiff, Sales Builders, Inc., have enjoyed and are continuing to enjoy freedom from price cutting and unfair competition, except as hereinafter set forth. That the plaintiff, Sales Builders, Inc., has refused and will refuse to sell the said plaintiff, Max Factor & Co., products to any and all wholesalers and jobbing distributors who do not execute the contract, a specimen of which is hereto attached, marked Exhibit "A," and plaintiff, Sales Builders, Inc., has refused and will refuse to sell the said plaintiff, Max Factor & Co., products to any and all retailers of cosmetics and toilet articles who do not execute the contract, a specimen of which is hereto attached, marked Exhibit "B."

XIV

That defendants, before the inauguration of the method of doing business by the contracts hereinbefore described, were retail distributors of plaintiffs' goods and made a pretense of selling such goods at prices conspicuously lower than other retail dealers in the state of California, in many instances at less than the cost of said commodities, to defendants, with the result that other dealers were forced to meet defendants' price competition by offering plaintiffs' goods for sale at prices competitive with those quoted by defendants. That upon the adoption of plaintiff, Sales Builders, Inc.'s, system of contracts, as aforesaid, a con- [fol. 10] tract in the form of Exhibit "B" was tendered to defendants and an opportunity given defendants to deal in plaintiffs' goods on the same terms offered to every other retail druggist in the state of California. That defendants declined to execute said contracts or to conform to the system of distribution adopted by plaintiff, Sales Builders, Inc., or to observe the prices fixed in said contracts. That since the establishment by plaintiff, Sales Builders, Inc., of said system of contracts, the defendants have repeatedly been requested to enter into a contract with plaintiff, Sales Builders, Inc., in the form hereto attached, as Exhibit "B," but said defendants have repeatedly refused to do so. That upon defendants' refusal to enter into said contract with plaintiff, Sales Builders, Inc., plaintiff, Sales Builders, Inc., declined and has continued to decline to sell its commodities to defendants unless and until defendants enter into said contract with plaintiff, Sales Builders, Inc.

XV

That upon plaintiff, Sales Builders, Inc., declining to sell its commodities to defendants, except as aforesaid, defendants, who had full knowledge of the system of contracts adopted by the plaintiff, Sales Builders, Inc., and of the fact that substantially all wholesale and retail dealers in the state of California have executed such contract and are operating in conformity with the terms thereof, conceived a wrongful and unlawful plan and scheme of harming, injuring and destroying plaintiff, Sales Builders, Inc.,'s said business and good will in the state of California by disrupting said system of lawful contracts existing between

said plaintiff, Sales Builders, Inc., on the one hand, and its wholesale and retail distributors on the other. That defendants have proceeded and are proceeding to carry out said unlawful and wrongful scheme and plan in the manner more particularly hereinafter set out, and in so doing have been and now are acting maliciously and without legal justification therefor.

XVI

That in pursuance and as a part of said unlawful and wrongful plan and scheme, defendants have procured and now procure commodities manufactured by plaintiff, Max Factor & Co. bearing the trade-marks, brands and names of plaintiff, Max Factor & Co., as heretofore set forth, unbeknown to plaintiffs or either of them, and have continually sold and are now selling said commodities at prices less than the retail sales price described in the contract, a specimen of which is hereto attached marked Exhibit "B," which said retail prices are being abided by — substantially all of the retail dealers in cosmetics and toilet articles in the state of California, as hereinabove set forth. That the [fol. 11] sales of the said defendants are at sixty-nine cents (69¢) for one dollar ($1.00) items, forty-three cents (43¢) for fifty cent (50¢) items and twenty-nine cents (29¢) for fifty cent (50¢) items, the resale price of which, as set forth in Exhibit "B" is one dollar ($1.00) and 50 cents (50¢) respectively, and said sales are at a proportionate reduction for any and all of the items described in said Exhibit "B." That plaintiff, Sales Builders, Inc., is informed and believes and therefore alleges that the cost to defendants of the said plaintiff, Max Factor & Co. products so sold by the said defendants is greater than the cost to the said defendants would be under a contract with the plaintiff, Sales Builders, Inc., as aforesaid.

XVII

That in further pursuance of the unlawful and wrongful plan and scheme, defendants have been and now are engaged in informing retail dealers under contract with plaintiff, Sales Builders, Inc., as well as the public generally of defendants' intention to sell plaintiffs' goods at the cut prices aforesaid.

XVIII

That the said acts of the defendants hereinbefore alleged are unlawful and unduly influencing the retail and wholesale distributors of plaintiff, Max Factor & Co., products, and the said wholesale and retail distributors have complained that they will be compelled to cancel the contracts with plaintiff, Sales Builders, Inc., hereinabove referred to, and to sell the said Max Factor products not in conformity with the terms of said contracts, but at prices which will meet those announced by the said defendants, and at which prices the said defendants sell at retail the said plaintiff, Max Factor & Co., products, the result of which will be a destruction of plaintiffs' businesses and the good will pertaining thereto. That unless the relief herein prayed for is granted the plaintiffs the said cancellations by the said wholesale and retail distributors will take place, and a large number, if not all of the lawful contracts of plaintiff, Sales Builders, Inc., will be cancelled by the said wholesale and retail distributors, who are now parties to the said contracts, and the destructive price cutting in force before said contracts were entered into will be resumed with the result that destructive and predatory price cutting of plaintiff, Max Factor & Co., products will then prevail, distribution of said goods will be obstructed, and plaintiffs' businesses and the good will pertaining thereto will be injured, if not wholly destroyed, and in addition thereto the wholesale and retail distributors will be prevented from obtain-
[fol. 12] ing and earning a reasonable profit in the sale and distribution of the said plaintiff, Max Factor & Co., products.

XIX

That on or about the 25th day of August, 1933, the said defendants received a written notice of the fact that the plaintiff, Sales Builders, Inc., was operating its system of business under the terms of the "Fair Trade Act" of the state of California, a copy of which notice is attached hereto, marked Exhibit "C" and incorporated herein as if specifically set forth at length. That since the receipt of the said notice by the said defendants, the said defendants have sold and disposed of plaintiff, Max Factor & Co., products at retail, as follows, to-wit:

Face powder for the sum of sixty-nine cents (69¢), the price of which, as set forth in Exhibit "B" and Exhibit "C", is one dollar ($1.00);

Rouge for the sum of forty-three cents (43¢), the price of which, as set forth in Exhibit "B" and Exhibit "C," is fifty cents (50¢);

Lipstick for the sum of twenty-nine cents (29¢), the price of which, as set forth in Exhibit "B" and Exhibit "C", is fifty cents (50¢).

That the sales so made by defendants as hereinabove in this paragraph and in paragraph XVI of this complaint set forth have not, nor have any of them, been made in closing out the stock of said defendants for the purpose of discontinuing delivering any commodities so sold, nor have the goods so sold or any of them been damaged or deteriorated in quality, nor has any notice of such damage or deterioration been given by the defendants to the public, nor have such sales or any of them been made by any officer acting under the orders of any court. That the defendants threaten to, and will, unless restrained by the order or judgment of this court, continue to sell and dispose of the products of said plaintiff, Max Factor & Co., at retail at prices less than the retail sales prices described in the contract, a specimen of which is hereto attached and marked Exhibit "B."

XX

That the continuance by defendants of their unlawful and wrongful plan and scheme aforesaid, and of their acts in pursuance and as a part thereof, hereinbefore specifically alleged and set forth, will produce great and irreparable injury to plaintiffs in that it will be extremely difficult, if not impossible, to ascertain the amount of dam-
[fol. 13] age that will afford plaintiffs adequate relief for their loss of sales and the destruction of the businesses of plaintiffs and the good will pertaining thereto, which, as heretofore shown, will result from such acts of defendants. That, unless plaintiffs are granted equitable relief by way of injunction against the wrongs complained of, a multiplicity of actions at law will be necessary to enable plaintiffs to obtain any redress for the repeated and continuing wrongful acts of defendants. That for the same reasons plaintiffs are without an adequate remedy at law.

Wherefore, plaintiffs pray judgment as follows:

(1) That the defendants and each of them be restrained and enjoined from selling, advertising or offering for sale any of the commodities distributed by plaintiff, Sales Builders, Inc., in the state of California, or any commodity bearing any of the trade-marks, brands or names of plaintiff, Max Factor & Co., including the trade-marks registered at the United States Patent Office, Washington, D. C., at prices less than the resale prices prescribed in Exhibit "B", attached hereto, and/or that the defendants be restrained and enjoined from selling any of the commodities and from advertising and offering any of such commodities for sale.

(2) For an injunction pendente lite.

(3) For such other and further relief as may be meet, just and equitable in the premises.

(4) For costs of suit.

Henry Haves, Attorney for Plaintiffs.

Duly sworn to by Louis Conrad. Jurat omitted in printing.

[fol. 14] EXHIBIT "A" TO AMENDED COMPLAINT

Agreement

This Agreement, Made and entered into between Sales Builders, Inc., hereinafter designated as Distributor, and —— ——, hereinafter designated as Wholesaler,

Witnesseth:

That, Whereas, distributor is exclusive distributor in the United States of America of Max Factor products, manufactured by Max Factor & Co., a corporation, and

Whereas, the parties hereto, for their mutual benefit and protection desire to cooperate with each other in the sale and distribution of the said Max Factor products, pursuant to the provisions of the "Fair Trade Act" of the State of California as enacted in 1931 and as amended in 1933.

Now, Therefore, pursuant to the provisions of the "Fair Trade Act" of the State of California, the parties hereto agree as follows:

(1) The wholesaler will not sell said Max Factor products except to retailers in the State of California, who have executed a contract with the distributor, the form of which is attached hereto, marked Exhibit "A."

(2) The distributor will notify the wholesaler of any and all retailers who have executed a contract in the form attached hereto, marked Exhibit "A"; and said wholesaler agrees not to sell any of the said Max Factor products to any retailer who has not executed the contract, a form of which is attached hereto, marked Exhibit "A," upon notice thereof from distributor.

(3) Distributor agrees to sell the said Max Factor products to the said wholesaler, at the following discounts.
Retail Price List.
Less 20%.
Less 15% and 5% net ten days.

(4) The Distributor expressly reserves the right to change the wholesale and retail selling prices of the Max Factor products, in the State of California, at any time, upon ten (10) days written notice.

(5) This agreement may be cancelled by either party by written notice to the other, but in the event of such cancellation, all of the Max Factor products in the possession of the wholesaler shall be sold by the said wholesaler to retailers, upon the conditions set forth herein.

In Witness Whereof, the parties hereto have hereunto placed their hands this — day of August, 1933.

Sales Builders, Inc., by —— ——, Distributor.
—— ——, Wholesaler.

[fol. 15] Agreement

In Accordance with, and pursuant to the provisions of the "Fair Trade Act" of the State of California as enacted in 1931, and as amended in 1933,

This Agreement is made and entered into between Sales Builders, Inc., hereinafter designated as Distributor, and —— ——, hereinafter designated as Retailer,

Witnesseth:

That, Whereas, Distributor is the exclusive distributor in the United States of America of the Max Factor products, manufactured and produced by Max Factor & Co., a corporation, and

Whereas, Retailer is a retailer of cosmetics and toilet articles in the State of California; and

Whereas, the parties hereto, for their mutual benefit and protection, desire to fix the prices of the Max Factor products sold at retail in the State of California,

Now, Therefore, the parties hereto agree as follows:

(1) The Retailer agrees to sell each of the following described Max Factor products at the price set opposite the description of each of the said products or articles:

Astringent	Lge. $2.00, Reg.	$1.00
Bleach Mask	Lge. 2.00, Reg.	1.00
Brillox	Lge. 1.00, Reg.	.50
Cleansing Cream (all kinds)	Lge. 2.00, Reg.	1.00
Compact (Vanity—all shades)		1.50
Compact (Loose Powder)		1.00
Eau de Cologne		.75
Eyebrow Pencil (purse-size & regular—all shades)		.50
Eyelash Make-Up (all shades)		1.00
Eyeshadow (all shades)		.50
Face Powder (all shades)		1.00
Face Powder Brush		1.00
Hand Lotion		.50
Honeysuckle Cream	Lge. $2.00, Reg.	$1.00
Lip Pomade (all shades)		.50
Lip Stick (Super-Indelible—all shades)		1.00
Lip Stick (Waterproof Permanent—all shades)		.50
Make-Up Blender (all shades)		1.00
Masque (all shades)		.50
Melting Cleansing Cream		1.00
Powder Foundation Cream (all shades)		1.00
Rouge (Society & Prof.—all shades)		.50
Rouge Refill (for Vanity—all shades)		.25

Skin & Tissue Cream	Lge.	2.00, Reg.	1.00
Skin Freshner			1.00
Vanishing Cream			.50
Theatrical Cold Cream	Lge.	.75, Reg.	.50

[fol. 16] And, or, any new Max Factor products at the manufacturer's established retail price.

(2) The Retailer will not sell said commodities or articles except at the price or prices hereinabove stipulated.

(3) The said prices are the only prices at which Max Factor products may be sold at retail in the State of California, and the said products and/or articles cannot be retailed at any other price or prices in the State of California.

(4) The Distributor expressly reserves the right to change the said retail selling prices of the Max Factor products in the State of California at any time upon ten (10) days written notice to Retailer by United States mail.

(5) Retailer agrees to sell the said Max Factor products at retail only within Retailer's own store or stores, and not otherwise.

(6) This agreement may be cancelled by either party upon written notice to the other, but in the event of such cancellation all of the Max Factor products in possession of the Retailer shall be sold by the said Retailer at the prices designated hereinabove, except as provided for in "Fair Trade Act."

In Witness Whereof the parties hereto have placed their hands and seals.

Dated at ——, California, this — day of ——, 193-.

Signature: —— ——, Distributor. Dealer's Name: —— ——. Signature: —— ——, Retailer.

Space for Dealer's Sticker.

[fol. 17] EXHIBIT "B" TO AMENDED COMPLAINT

Agreement

In Accordance with, and pursuant to the provisions of the "Fair Trade Act" of the State of California as enacted in 1931, and as amended in 1933,

This Agreement is made and entered into between Sales Builders, Inc., hereinafter designated as Distributor, and —— ——, hereinafter designated as Retailer,

Witnesseth:

That, Whereas, Distributor is the exclusive distributor in the United States of America of the Max Factor products, manufactured and produced by Max Factor & Co., a corporation, and

Whereas, Retailer is a retailer of cosmetics and toilet articles in the State of California; and

Whereas, the parties hereto, for their mutual benefit and protection, desire to fix the prices of the Max Factor products sold at retail in the State of California,

Now, Therefore, the parties hereto agree as follows:

(1) The Retailer agrees to sell each of the following described Max Factor products at the price set opposite the description of each of the said products or articles:

Astringent	Lge. $2.00, Reg.	$1.00
Bleach Mask	Lge. 2.00, Reg.	1.00
Brillox	Lge. 1.00, Reg.	.50
Cleansing Cream (all kinds)	Lge. 2.00, Reg.	1.00
Compact (Vanity—all shades)		1.50
Compact (Loose Powder)		1.00
Eau de Cologne		.75
Eyebrow Pencil (purse-size & regular—all shades)		.50
Eyelash Make-Up (all shades)		1.00
Eyeshadow (all shades)		.50
Face Powder (all shades)		1.00
Face Powder Brush		1.00
Hand Lotion		.50
Honeysuckle Cream	Lge. $2.00, Reg.	1.00
Lip Pomade (all shades)		.50
Lip Stick (Super-Indelible—all shades)		1.00
Lip Stick (Waterproof Permanent—all shades)		.50
Make-Up Blender (all shades)		1.00

Masque (all shades)		.50
Melting Cleansing Cream		1.00
Powder Foundation Cream (all shades)		1.00
Rouge (Society & Prof.—all shades)		.50
Rouge Refill (for Vanity—all shades)		.25
Skin & Tissue Cream	Lge. 2.00, Reg.	1.00
Skin Freshner		1.00
Vanishing Cream		.50
Theatrical Cold Cream	Lge. .75, Reg.	.50

[fol. 18] And, or, any new Max Factor products at the manufacturer's established retail price.

(2) The Retailer will not sell said commodities or articles except at the price or prices hereinabove stipulated.

(3) The said prices are the only prices at which Max Factor products may be sold at retail in the State of California, and the said products and/or articles cannot be retailed at any other price or prices in the State of California.

(4) The Distributor expressly reserves the right to change the said retail selling prices of the Max Factor products in the State of California at any time upon ten (10) days written notice to Retailer by United States mail.

(5) Retailer agrees to sell the said Max Factor products at retail only within Retailer's own store or stores, and not otherwise.

(6) This agreement may be cancelled by either party upon written notice to the other, but in the event of such cancellation all of the Max Factor products in possession of the Retailer shall be sold by the said Retailer at the prices designated hereinabove, except as provided for in "Fair Trade Act."

In Witness Whereof the parties hereto have placed their hands and seals.

Dated at ——, California, this — day of ——, 193-.

Signature: —— ——, Distributor. Dealer's Name: —— ——. Signature: —— ——, Retailer.

Space for Dealer's Sticker.

[fol. 19] EXHIBIT "C" TO AMENDED COMPLAINT

Notice

To Wilshire Drug Co., and to Whom It May Concern:

You and Each of You will please take notice that Sales Builders, Inc., is the distributor in the United States of America, of the products manufactured by Max Factor & Co., consisting of cosmetics, toilet articles, etc.

You Are Further Notified that the "Fair Trade Act" of the State of California was enacted in 1931 and amended in 1933.

You Are Further Notified that the said "Fair Trade Act" was enacted for the purpose of protecting the manufacturers, distributors and retailers of trade marked articles and products.

You Are Further Notified that Sales Builders, Inc. is entering into contracts with the retailers of cosmetics and toilet articles, for the purpose of protecting all concerned. A copy of said contract is enclosed herewith for your information, with a request that you execute the same.

According to the terms of the said contract, the Max Factor products are to be sold at retail at the prices as follows:

Astringent	Lge. $2.00, Reg. $1.00
Bleach Mask	Lge. 2.00, Reg. 1.00
Brillox	Lge. 1.00, Reg. .50
Cleansing Cream (all kinds)	Lge. 2.00, Reg. 1.00
Compact (Vanity—all shades)	1.50
Compact (Loose Powder)	1.00
Eau de Cologne	.75
Eyebrow Pencil (purse-size & regular—all shades)	.50
Eyelash Make-Up (all shades)	1.00
Eyeshadow (all shades)	.50
Face Powder (all shades)	1.00
Face Powder Brush	1.00
Hand Lotion	.50
Honeysuckle Cream	Lge. $2.00, Reg. 1.00
Lip Pomade (all shades)	.50
Lip Stick (Super-Indelible—all shades)	1.00
Lip Stick (Waterproof Permanent—all shades)	.50
Make-Up Blender (all shades)	1.00

Masque (all shades)		.50
Melting Cleansing Cream		1.00
Powder Foundation Cream (all shades)		1.00
Rouge (Society & Prof.—all shades)		.50
Rouge Refill (for Vanity—all shades)		.25
Skin & Tissue Cream	Lge. 2.00, Reg.	1.00
Skin Freshner		1.00
Vanishing Cream		.50
Theatrical Cold Cream	Lge. .75, Reg.	.50

[fol. 20] Practically every retailer of cosmetics and toilet articles in the State of California is executing the contract, a copy of which is enclosed herewith.

Heretofore you have been requested to enter into a similar contract, but have refused. If you do not enter into this contract, Sales Builders, Inc. will be unable to sell you the said Max Factors Products, and in addition thereto, if you obtain any of the Max Factor products and sell the same at less than the prices enumerated herein, legal proceedings will be instituted, for the purpose of enjoining you, and collecting damages for such injury as Sales Builders, Inc. may sustain by reason of your said acts.

You may govern yourself accordingly.

Dated at Los Angeles, California this 24th day of August, 1933.

(Sd.) Henry Haves, Attorney for Sales Builders, Inc.

[File endorsement omitted.]

[fol. 20-a] In Superior Court of Los Angeles County

Demurrer to Plaintiffs' Amended Complaint—Filed January 15, 1934

Comes now the defendant Clarence G. Kunsman, and for demurrer to plaintiffs' amended complaint alleges as follows:

I

That said amended complaint does not state facts sufficient to constitute a cause of action.

Dated January 12, 1934.

Bart F. Wade, Attorney for Defendant Clarence G. Kunsman.

I certify that the foregoing demurrer is made in good faith and that in my opinion the same is well taken.

Bart F. Wade.

Points and Authorities

Section 430, Code of Civil Procedure.

Endorsed: Received copy of the within demurrer this 15 day of Jan., 1934. Henry Haves (S. R.)

[File endorsement omitted.]

[fol. 21] In Superior Court of Los Angeles County

[Title omitted]

Order Sustaining Demurrer—January 19, 1934

Demurrer to amended complaint, transferred from Department 44, comes on for hearing; Henry Haves appearing as attorney for plaintiffs and Bart F. Wade for defendants. Said demurrer is sustained without leave to amend.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 21-a] In Superior Court of Los Angeles County

Judgment—Filed February 2, 1934

The above entitled cause having come on regularly for hearing on the 19th day of January, 1934, before the court, sitting in Department 47 thereof, on defendant's Clarence G. Kunsman demurrer to plaintiffs' amended complaint; Henry Haves, Esquire, appearing on behalf of plaintiffs and Bart F. Wade, Esquire, appearing on behalf of the defendant Clarence G. Kunsman, and the said demurrer having been argued and fully submitted to the court, and the court being fully advised thereupon, having made and entered its order sustaining defendant's said demurrer to plaintiffs' amended complaint, without leave to amend; and it appearing that the action has been dismissed as to the fictitious defendants;

Now, therefore, by virtue of the law and by reason of the premises aforesaid;

It is ordered, adjudged and decreed that plaintiffs have and recover nothing from the defendant Clarence G. Kunsman, and that the plaintiffs, and each of them, be denied [fol. 22] any and all relief prayed for in their said amended complaint, and that defendant Clarence G. Kunsman have judgment for his costs and disbursements incurred herein.

Dated at Los Angeles, California, this 2d day of February, 1934.

Emmet H. Wilson, Judge of Said Court.

[File endorsement omitted.]

[fol. 22-a] IN SUPERIOR COURT OF LOS ANGELES COUNTY

NOTICE OF APPEAL—Filed February 8, 1934

To the Defendant, Clarence G. Kunsman, and to Bart F. Wade, Esq., His Attorney:

You and each of you will please take notice that the plaintiffs, Max Factor & Co., a corporation, and Sales Builders, Inc., a corporation, hereby appeal to the Supreme Court of the state of California from all and every part of the judgment made and entered against said plaintiffs in the above entitled action in favor of the defendant, Clarence G. Kunsman. Said judgment was entered on February 5, 1934, in book 874 at page 213 of judgments, in the office of the county clerk of Los Angeles county. Said plaintiffs hereby appeal from the whole and every part of said judgment.

Dated at Los Angeles, California, this 8th day of February, 1934.

Henry Haves, M. C. Sloss, Sloss & Turner, by Henry Haves, Attorneys for Plaintiffs.

Endorsed: Received copy of the within notice this 8th day of February, 1934. Bart F. Wade, K., attorney for defendant.

[File endorsement omitted.]

[fol. 23] IN SUPREME COURT OF CALIFORNIA

L. A. No. 14662. In Bank

MAX FACTOR & Co. (a Corporation), and SALES BUILDERS, INC. (a Corporation), Plaintiffs and Appellants,

v.

CLARENCE G. KUNSMAN, Defendant and Respondent

[fol. 24] This cause presents an attack upon the provisions of the "Fair Trade Act" adopted by the legislature in 1931 (Stats. 1931, p. 583; Deering's Gen. Laws, Act 8782), as amended in 1933 (Stats. 1933, p. 793; Deering's Gen. Laws, Act 8782).

OPINION—February 28, 1936

Prior to the adoption of these provisions, the legislature adopted an act commonly known as the "Cartwright Act", in order to promote free competition in commerce, which, among other things, declares it to be unlawful for two or more persons to enter into any combination or contract by which they agree to establish the price of any commodity to the public or consumer, and declares any such combination or contract to be against public policy, and void. (Stats. 1907, p. 984, as amended by Stats. 1909, p. 593; Deering's Gen. Laws, Act 8702.) The Fair Trade Act departs widely from the restrictive provisions of the Cartwright Act, in that it provides (in section 1) that "no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trademark, brand, or name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California" by reason of any provision which may be contained in such contract, among others, (1) "that the buyer will not resell such commodity except at the price stipulated by the vendor;" and (2) "that the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee. This statute, as originally passed, limits its application to persons who volun-

tarily enter into such contracts with respect to such resale prices, thus apparently seeking to except such contracts from the application of accepted principles respecting combinations and monopolies restraining trade through price-fixing agreements. The amendment to the Fair Trade Act added in 1933, designated as section 1½, presents the crucial point of this case. It reads as follows: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

These facts appear from the allegations of the complaint: The plaintiff, Max Factor & Co., a Delaware corporation, engaged in the manufacture of cosmetics and toilet articles manufactured by it under certain adopted and registered trade-marks. These trade-marks have long been used in connection with the manufacture, sale and distribution of the cosmetics and toilet articles manufactured and sold by the corporation; that the corporation is the sole owner of the business and good-will in the state of California and all the states in the United States connected with the distribution and sale of the articles associated with such trade-marks; that prior to the commencement of this action, Max Factor & Co. transferred and sold to the plaintiff Sales Builders, Inc., the exclusive right and privilege of distributing and selling in the states of the United States, including the state of California, the cosmetics and toilet articles then and thereafter manufactured by Max Factor & Co., and the good-will pertaining thereto, with the right to use the trade-marks, and the sole right to sell and distribute the cosmetics and toilet articles in all these states. Plaintiff Sales Builders, Inc., has ever since been, and is, the sole owner of the exclusive right to sell and distribute in all of the states, including California, all of the cosmetics and toilet articles manufactured by the plaintiff Max Factor & Co., and associated with the use of the trade-marks adopted by Max Factor & Co.

The defendant is, and at the times mentioned has been, the owner, proprietor and operator of a retail drug store

situated in the city of Beverly Hills in this state, and was, and now is, engaged in selling at retail to consumers of cosmetics, toilet articles and other merchandise.

For many years there has developed in the drug trade in California the practice of cutting prices, both wholesale and retail, of well-advertised commodities well known to the public, and sold and identified under distinctive trade-marks, brands and names. Such products have been, and are, offered by retail dealers at prices conspicuously lower than the marked or established prices of said commodities as so-called "leaders", for the purpose of creating the impression that other goods of which the prices are not so well known are sold at corresponding reductions, and that all articles dealt in by the particular dealer are sold by him at less than they could be obtained elsewhere. The stores in which these practices are prevalent have become known as "cut-rate drug stores." The complaint here sets out at some length matter relative to the fact that the practice of cutting known and established prices has engendered a condition by which other dealers were forced to meet the cut prices advertised by their competitors, one cut producing another in retaliation, so that ultimately, in a particular community, well-known articles identified by trade-marks, brands, and names with an established price are offered at [fol. 25] prices cut to a point which yields no profit, and in many cases represents a loss. Other alleged evils of the practice are set forth at length. It is also alleged that to remedy this evil the legislature of California has enacted the Fair Trade Act, supra, the constitutionality of which act is here sought to be established.

In order to protect itself against the alleged injuries and uneconomic practices described in the complaint, plaintiff Sales Builders, Inc., adopted a system of doing business, as set out in the complaint, under which contracts are entered into between the plaintiff and its wholesale jobbing distributers, and between plaintiff and retail druggists and other persons, firms, or corporations selling the Factor products in the state of California, by the terms of which contracts the distributers are obligated to sell these products only to retailers who will resell the same at specified prices, and who, in turn, have entered into a written contract with the plaintiff Sales Builders, Inc., to sell the Fac-

tor products at the specified prices. The prices fixed and established by plaintiff Sales Builders, Inc., in said contracts, it is alleged, are fair and reasonable, and no higher than is required to yield to distributers at wholesale and retail a reasonable compensation for their services. It is also alleged that, as known to defendant, practically all of the wholesale druggists in the state of California have executed these wholesale distributers' contracts, and practically all of the retail druggists in the state of California, including the prominent department stores dealing in cosmetics and toilet articles, have executed the retail distributers' contracts, and are observing and conforming with the terms of the contracts. Price-cutting on products of plaintiff Max Factor & Co. has ceased, and plaintiff Sales Builders, Inc., is enjoying, under the terms of the California Fair Trade Act, a reasonable profit from the sale of its goods, and immunity from destructive and uneconomic price-cutting. The distribution of its goods has been unobstructed, and its business has been greatly benefited.

However, the defendant, a retail distributor of plaintiffs' goods, is engaged in selling such goods at prices conspicuously lower than other retail dealers in the state of California, in many instances at less than the cost of the commodities to the defendant, with the result that other dealers are forced to meet defendant's price competition by offering plaintiffs' goods for sale at prices competitive with those quoted by defendant. Sales Builders, Inc., upon inauguration of its system of contracts heretofore referred to, tendered to defendant a contract and an opportunity to deal in plaintiffs' goods on the same terms offered to every other retail dealer in the commodity in the state of California. The defendant refused and declined to execute the contract or to conform to the system of distribution employed by Sales Builders, Inc., or to observe the sales price fixed in the contract.

The plaintiff Sales Builders, Inc., declined, and has continued to decline, to sell its commodities to the defendant unless and until the defendant enters into the tendered contract with plaintiffs. Defendant has proceeded, and is proceeding, to carry out the alleged unlawful and wrongful scheme, and, it is alleged, in so doing has been, and is, acting maliciously and without legal justification therefor. In pursuance and as part of the wrongful and unlawful plan

and scheme, defendant, unbeknown to plaintiffs, has procured, and continues to procure, commodities manufactured by Max Factor & Co. bearing the trade-marks, brands and names of Max Factor & Co., and has sold, and is now selling, the commodities at prices less than the retail sales prices which are being sustained by substantially all of the retail dealers in cosmetics and toilet articles in the state of California. Defendant has been, and now is, engaged in informing retail dealers under contract with plaintiff Sales Builders, Inc., as well as the public generally, of defendant's intention to sell plaintiffs' goods at cut-rate prices, which act and the others in the complaint complained of are unduly influencing retail and wholesale distributers of Max Factor & Co.'s products; and the wholesale and retail distributers have complained that they will be compelled to cancel the contracts with plaintiff Sales Builders, Inc., and to sell the Max Factor & Co. products not in conformity with the terms of the contracts entered into by them, but at prices which will meet those announced by the defendant, and at which prices the defendant sells at retail the Max Factor & Co. products. The result of such cancellation, it is claimed, will be the destruction of the business of plaintiffs and the goodwill pertaining thereto.

It is further alleged that the defendant threatens to, and will, unless restrained by judgment of court, continue to sell and dispose of the products of the plaintiff Max Factor & Co. at retail prices less than the retail sales prices regulated by plaintiffs, the continuance of which acts will produce great and irreparable injury to plaintiffs in that it will be extremely difficult, if not impossible, to ascertain the amount of damage that will afford plaintiffs adequate relief for the loss of sales and the destruction of business of plaintiffs and the goodwill pertaining thereto. For these reasons, plaintiffs seek equitable relief by way of injunction against the wrongs complained of.

To the complaint containing the foregoing allegations, defendant interposed a general demurrer, which the trial court sustained without leave to amend. Judgment was thereupon entered for the defendant, and the plaintiffs have appealed, presenting the single question: "Is section 1½, added to the Fair Trade Act of the state of California in 1933 (Stats. 1933, p. 793, supra), constitutional?"

The title of the Fair Trade Act as passed in 1931 indicates its purpose. It is as follows: "An act to protect

trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name." (Stats. 1931, p. 583.) In its entirety, the act aims at preventing price-cutting of articles sold under a trade or brand name, or under a trade-mark. As amended in 1933 (Stats. 1933, p. 793), section 1½ provides, in order to accomplish the above purpose, that all retailers, whether the goods were originally sold to them under a contract fixing the resale price or not, who have knowledge of such contracts of resale, must sell at not less than the fixed price. It is respondent's main contention that such a statute violates the due process and equal protection clauses of the federal and state constitutions, in that it denies to him the liberty and freedom of contract.

We think there are certain fundamental concepts which are decisive of the present case:

1. In the first place, this court has neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the legislature. We recognize that economic and juridical thought is, and for many years has been, divided on the economic question as to the benefits to the consuming public of free and open competition, and its necessary corollary, price-cutting. The Sherman and Clayton Anti-Trust Acts passed by congress, and the Cartwright Act passed by our state legislature, and [fol. 26] many other similar statutes, are indications that the particular legislatures involved, at the time such statutes were passed, were of the view that, from a social standpoint, free and open competition was desirable. The basis of this view is that, in the long run, it is against public interest to allow the manufacturer, producer, or distributer to fix the resale price of an article. In recent years, there has developed, in opposition to the above views, the concept that a manufacturer of a trade-marked article that is sold in competition with articles of a similar nature and who has fixed a fair price at which he, as well as his distributer and retailer, can make a fair profit, has a property right in the goodwill towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to use it in a misleading way to deceive the public. The basic theory on which this concept rests is that,

from a social standpoint, price-cutting, in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products. This latter protection is found in section 2 of the present act, which prohibits manufacturers contracting between themselves to fix the resale price.

As already indicated, the state legislature, by the adoption of the Cartwright Act, supra, adopted in 1907, partially, at least, the first economic policy above discussed. By the enactment of the Fair Trade Act in 1931, as amended in 1933, the state legislature, for reasons known to it and which we must presume were sufficient, has seen fit to attempt to change its former policy, and to adopt the second economic concept above discussed. In so far as the statute involves a mere change in the economic policy of the state, this court has no power or right to interfere. The members of the court may or may not agree with the economic philosophy of the Fair Trade Act, but it is no part of the duty of this court to determine whether the policy embodied in the statute is wise or unwise. It is primarily a legislative and not a judicial function to determine economic policy. The power of the court is limited to determining whether the subject of the legislation is within the state's power, and if so to determine whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained. These principles have frequently been stated by the United States Supreme Court. In the recent case of Nebbia v. New York, 291 U. S. 502, at page 537, 54 Sup. Ct. Rep. 505, Mr. Justice Roberts, speaking for the majority of the court, said:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satis-

fied, and judicial determination to that effect renders a court functus officio. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' (Northern Securities Co. v. United States, 193 U. S. 197, 337-8.) And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory, it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

"The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at

large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

In Central Lumber Co. v. South Dakota, 226 U. S. 157, 160, 33 Sup. Ct. Rep. 66, Mr. Justice Holmes stated:

"If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

As was said in In re Lasswell, 1 Cal. App. (2d) 183, 188, 36 Pac. (2d) 678:

"It is a salutary doctrine that statutes should be sustained by the courts wherever and whenever this is reasonably possible. It is the purpose, right and duty of the legislative branch of the government to enact such legislation as it deems desirable and its limitations are natural law and the written Constitutions; the courts have no voice in the policy nor in the wisdom of legislative action; they construe the language of the statute and determine its constitutional status."

2. In the second place, it must be kept in mind that the [fol. 27] present statute is one passed in the exercise of the state's police power, and so differs fundamentally from statutes passed by the federal government. The latter is, of course, limited by the powers enumerated in the Constitution, while the states are not subject to such limitation. When the statute is viewed from the standpoint of police power, it is at once apparent that it is not a complete answer to the question of constitutionality to merely point out that the statute restricts a retailer from selling property of a certain class owned by him at prices fixed by himself, and so, of course, restricts his freedom of contract. There is no constitutional right to own property, as such, free from regulation. That a state statute deprives a person of a

right which he formerly possessed, whether it be a right to go where he pleases, conduct himself as he pleases, or buy what he pleases, or sell what he pleases at prices fixed by himself, does not per se brand the statute as unconstitutional. The process of civilization has consisted largely of the gradual regulation of the individual in his liberty of action and ownership of property for the public good. As society has become more complex, the necessity for such regulation has become more acute. Neither the state nor the federal constitution guarantees any person absolute liberty of action. The liberty guaranteed by our law is a liberty subject to regulation in the public good—an equal liberty rather than an absolute liberty. In Jacobson v. Massachusetts, 197 U. S. 11, 26, 25 Sup. Ct. Rep. 358, this principle is expressed as follows: "But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."

In holding a state statute constitutional which provided that all employees should be paid in cash and paid semi-monthly, and that such regulation should apply even to existing contracts, the United States Supreme Court, in Erie R. R. Co. v. Williams, 233 U. S. 685, 699, 34 Sup. Ct. Rep. 761, stated:

"The legislation having been passed in the exercise of the reserved power of the state, is it valid, notwithstanding it prohibits both the plaintiff and its employees from contracting against its provisions? Plaintiff asserts the negative and attempts to sustain the assertion by a very comprehensive argument in which a number of decisions of

this court and of other courts are cited and reviewed. They illustrate by various instances the fundamental and indisputable principle that personal liberty includes the power to make contracts. But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

Under its police power, the state, in a proper case has the power, acting in the interests of the general welfare, to regulate property and contract rights, and this includes, of course, the power to regulate the right of free bargaining. The fact that a state can lawfully pass a statute requiring free and open competition, such as the Cartwright Act, supra, which regulates the rights of a manufacturer or producer, and limits his freedom of contract, indicates this power exists.

The fact that a statute limits the rights of the owner of property, lowers its value, or limits its use, or limits the right of free bargaining in other ways, does not, of itself, determine the validity of the enactment. There are innumerable illustrations of statutes, passed under the police power, which interfere with the right of free bargaining which have been upheld on the theory the regulation is in the public interest. There are limits to this power, of course, but within those limits the legislature is supreme. These limits cannot be fixed by precedent. As the state progresses, the police power, within reason, develops to meet the changing conditions. (Miller v. Board of Public Works, 195 Cal. 477, 484, 234 Pac. 381; People ex rel. v. Associated Oil Co., 211 Cal. 93, 100, 294 Pac. 717.)

Many illustrations of the power of the state to regulate, in the public interest, the right of free bargaining could be given. The United States Supreme Court has held that a legislature may (1) fix the charges the owners of grain elevators and warehouses may make (Munn v. Illinois, 94 U. S. 113; Budd v. New York, 143 U. S. 517, 12 Sup. Ct. Rep. 468); (2) fix the charges of insurance companies (German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. Rep. 612); (3) fix the time within which the services of employees must be paid for and provide for semi-monthly payments of wages, and prohibit contracts varying the times of payment (Erie R. R. Co. v. Williams, 233 U. S. 685, 34 Sup. Ct. Rep. 761); (4) fix the fees chargeable by attorneys appearing for employees before workmen's compensation commissioners (Yeiser v. Dysart, 267 U. S. 540, 45 Sup. Ct. Rep. 399); (5) fix the rate of pay for overtime work (Bunting v. Oregon, 243 U. S. 426, 37 Sup. Ct. Rep. 435); (6) establish maximum hours of labor for men in certain industries (Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. Rep. 383); (7) establish maximum hours of labor for women (Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. Rep. 324; Miller v. Wilson, 236 U. S. 373, 35 Sup. Ct. Rep. 342); (8) prohibit the payment of wages in advance (Patterson v. Bark Eudora, 190 U. S. 169, 23 Sup. Ct. Rep. 821); (9) require loaves of bread of only a certain size be sold (Schmidinger v. Chicago, 226 U. S. 578, 33 Sup. Ct. Rep. 182); (10) establish maximum rentals (Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. Rep. 458; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. Rep. 465); (11) fix the maximum rate of interest chargeable on loans (Griffith v. Connecticut, 218 U. S. 563, 31 Sup. Ct. Rep. 132); (12) regulate the net weight of retail packages (Armour & Co. v. North Dakota, 240 U. S. 510, 36 Sup. Ct. Rep. 440); (13) declare sales of commodities on margin or for future [fol. 28] delivery void (Booth v. Illinois, 184 U. S. 425, 22 Sup. Ct. Rep. 425); (14) forbid unfair competition by charging of lower prices in one locality than those exacted in another (Central Lumber Co. v. South Dakota, 226 U. S. 157, 33 Sup. Ct. Rep. 66); (15) fix the retail price of milk (Nebbia v. New York, 291 U. S. 502, 54 Sup. Ct. Rep. 505).

In each of the above cases the police power of the state was held broad enough to warrant an interference with free bargaining. As was said by Chief Justice Hughes in

Miller v. Wilson, supra, at page 380, "As the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest—the question is whether the restrictions of the statute have reasonable relation to a proper purpose."

The police power is no longer limited to measures designed to protect life, safety, health, and morals of the citizens, but extends to measures designed to promote the public convenience and the general prosperity (People ex rel. v. Associated Oil Co., supra; Chicago, B. & Q. Ry. v. Illinois, 200 U. S. 561, 26 Sup. Ct. Rep. 341), and includes economic measures regulating competition. (Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. Rep. 436; Nebbia v. New York, supra.)

The above cases conclusively establish that there is no absolute right of free bargaining guaranteed by the Constitution. Since, under the proper circumstances, the right of free bargaining can be, and in the past has been, regulated, it necessarily follows that, in a proper case, this power to regulate free bargaining includes the power to regulate the price. Every one of the cases above cited, and many more that could be cited, illustrate the breadth of the power invested in the state legislature to affect the terms of a business bargain between individuals, and in every case the regulation affected the price. As was said in the Nebbia case, supra (p. 532): "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. (Munn v. Illinois, 94 U. S. 113.)"

Respondent seriously urges that the legislature can only regulate prices as to those articles "affected with a public interest". There are several answers to this contention. As already pointed out, this statute does not aim primarily at regulating prices, but at protecting the property and contract rights of the manufacturer, producer, distributer

and retailer. Moreover, the statute does not attempt to regulate the price of any one article. It may be that when the legislature attempts to regulate the price of a particular commodity, in order to justify classifying that article differently from other commodities, its purchase and sale must affect the public interest. But here the legislation affects an entire class of articles, which class, as will later appear, is reasonably the subject of classification. Another complete answer to this contention is that if the purchase and sale of any one article or entire class of articles is subject to regulation under the police power, for reasons already stated, then its purchase and sale does affect the public interest. This was the exact holding in the Nebbia case, supra, where, at pages 533 and 536, it is stated:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. Thus understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression. * * *

"The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest', and 'clothed with a public use', have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon a proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

The next major factor that must be emphasized is that the statute here involved is not solely a price fixing or regulating statute. It is true that the statute permits the producer to fix by contracts with his disributer, and the latter by contracts with retailers, the minimum resale price of

the product, and that by section 1½ of the act the minimum price so fixed is made binding on all retailers who have knowledge of the contracts, and in this sense it is a price regulating statute. However, to regulate prices as such was not the main purpose of the statute. The statute only applies to certain articles sold under the trade-name or brand or trade-mark of the producer. As to such articles, the producer or manufacturer, through advertising or other means, has built up a good-will in connection with the articles, which good-will is a species of property entitled to protection. When the retailer sells such an article to a customer, the article is not sold solely on the reputation of the retailer, but partially, at least, on the reputation built up by the owner of the trade-mark, brand or trade-name. Moreover, section 1½ comes into operation only when the manufacturer or producer has entered into contracts fixing the resale price. The statute, as its title indicates, by preventing price-cutting, is aimed at protecting these valuable property and contract rights of the manufacturer or producer—rights just as valuable and just as much entitled to protection as the right of the retailer, who is attempting, by exercising his claimed right of freedom of action, to injure the property and contract rights of the manufacturer or producer. The statute, in other words, does not merely prohibit price-cutting in order to regulate prices, but prohibits price-cutting in an attempt to protect the validly acquired rights of others. The common law, without statutory authorization, long recognized that unjustifiable interference with contract rights of others constituted a tort. (Lumley v. Gye, 2 El. & Bl. 216. The statute here involved, in a large measure, merely extends that common law doctrine to the transactions enumerated in the statute.

(4) Another important factor that must be kept in mind is that in so far as the Fair Trade Act permits the producer to fix the resale price of his product by contract, the act merely embodies a rule of law well settled in this state. In Grogan v. Chaffee, 156 Cal. 611, 105 Pac. 745, and in D. Ghirardelli Co. v. Hunsicker, 164 Cal. 355, 128 Pac. 1041, it was held that as far as articles in intrastate commerce [fol. 29] are concerned, without statutory authorization the manufacturer, by contract with a retailer, may fix the resale price. The Fair Trade Act as passed in 1931 merely codifies the rule of those cases, which was partially changed by the Cartwright Act, supra.

When the above concepts are applied to section 1½ of the Fair Trade Act, we have no hesitancy in holding that the section is constitutional. The object sought to be attained is clearly within the sphere of state regulation, and the means provided in the statute have a reasonable relation to this object. In our opinion the statute is neither arbitrary nor discriminatory.

California apparently is the first state to have passed a statute containing the provisions found in section 1½ of the Fair Trade Act. New Jersey, in 1916, however, passed a statute that permitted the manufacturer to fix the resale price of a trade-marked article, or article sold under a trade or brand name, by attaching a notice fixing the resale price to the container in which the article was sold. The resale price so fixed was made binding on all retailers. In Ingersoll & Bro. v. Hahne & Co., 88 N. J. Eq. 222, 101 Atl. 1030, 89 N. J. Eq. 332, 108 Atl. 128, the New Jersey court, in two opinions, held the statute constitutional on substantially the same reasoning set forth in this opinion.

Since the oral argument and submission of the cause, respondent has cited a decision of the New York court of appeals, in which that court held the New York Fair Trade Act unconstitutional. (Doubleday, Doran & Co., Inc., v. R. W. Macy & Co., Inc., decided January 7, 1936, — N. Y. —, 199 N. E. 409.) Because the New York act was copied almost verbatim from the California statute, respondent cites the opinion of the New York court as "strongly persuasive" We are not prepared to share counsel's optimistic view of the weight to be given the decision. While, on first impression, it seems entitled to the importance attached to it by respondent, we are of the view that, upon careful analysis, it loses its persuasive force. A brief discussion of the decision will, we believe, be helpful in throwing in relief some of the highlights of the situation now before this court. For several reasons, the decision of the New York court impresses us as not being in point in the discussion here. It is expressly limited to a declaration that section 2 of the New York act (identical with section 1½ of the California act) is unconstitutional "as applied to the facts set forth", which are different from those of the case now before this court. The plaintiffs in the New York case were Doubleday, Doran & Company, Inc., publishers, and Doubleday, Doran Book Shops, Inc., retailers.

The contract mentioned in the decision is one between the publishing corporation and the retailing corporation. Aside from any inference to be drawn from the similarity of names, the opinion states that the two plaintiffs, in reality, were one and the same, for it refers to "the price which they [the plaintiffs] stipulated as a retail price in a *contract between themselves.*" Other language indicates the book shop corporation is merely a subsidiary and agent of the publishing company. Again, the plaintiff publishers sold the books in question to the defendant without exacting or, in so far as appears, attempting to exact, from the buyer any restriction on the price for resale. In other words, the producer of goods placed a retail price upon its product by its own independent action, and voluntarily sold the goods to a retailer (Macy & Co.) for resale without seeking, or at least obtaining, any agreement by the retailer to observe any retail price. In the action, it seeks to prevent the retailer, to whom it has sold the goods without restrictions, from selling the goods at prices less than those which the producer saw fit to fix, in a contract between it and a subsidiary. The New York court accepts, for the purpose of the decision, the interpretation of the act as covering such situation, and, upon that assumption, and apparently that assumption alone, holds section 2 of the act to be unconstitutional. The plaintiffs in the New York case allege only a single contract purporting to fix the resale prices, and that in a pretended contract made with itself, far different from the factual setup in the Max Factor & Co. case. Here there has been adopted a system of making written contracts, generally between producers and retail distributers, under which the products may and will be sold only to retailers who will resell at specified prices and have entered into contracts with the distributer to so sell such products. Practically all of the wholesale and retail druggists in California have executed such contracts, and are observing them, and the plaintiffs' distributers have refused, and will refuse, to sell such products to wholesalers or retailers who do not enter into such contracts. A contract has been tendered to defendant for execution, but defendant will not enter into the agreement. The plaintiffs therefore decline to sell the commodities to defendant unless the defendant enters into the contract. The defendant, with full knowledge of the system of contracts, and

the extent of the execution and compliance with their terms by the trade, has obtained Factor products "unbeknown" to plaintiffs, and is selling them at prices less than the prices fixed by the contracts so extensively entered into by others. These facts serve to vitally differentiate the situation in New York from that here. In place of a single pretended contract made by the producer with itself, we have here a uniform system of contracts applied generally to wholesale and retail distributers in the state. In place of a voluntary sale without restriction by the producer to a retailer, there is here a consistent refusal by the producer or owner to sell to the defendant or to any other buyer who will not agree to maintain resale prices. A retailer who has been given an opportunity to enter into the contract has refused to do so, and, having obtained goods, not from the producer or owner, but indirectly and without the consent or knowledge of the producer, is engaged in cutting prices of the products. The New York decision does not discuss the fundamental basis and purpose of the legislation represented in the California Fair Trade Act, and does not disclose the ground upon which the section of the New York act, as interpreted for the purpose of the decision, is unconstitutional. We cannot find, in this casual treatment of a constitutional question, sufficient justification for regarding the decision as applicable to the facts here.

Respondent also urges that the statute denies equal protection of the laws in that it applies only to articles sold under a trade-mark or trade or brand name, and does not apply to non-trade-marked commodities, and, among trade-marked articles, applies only to those in free and open competition with others of a similar nature. As already pointed out, it is only in reference to those commodities included within the statute that the manufacturer or producer has a property right in the nature of good-will, which, in the public interest, should be protected. Such a classification is reasonable. The exclusion of trade-marked articles not in free and open competition with others of a similar nature is likewise reasonable. By that provision the public is protected from artificially high prices imposed by one with an exclusive market. (See *Borden's Farm Products Co.* v. *Ten Eyck, Commissioner,* decided by the United States Supreme Court, February 10, 1936.)

[fol. 30] The contention made by the respondent that the Fair Trade Act attempts to regulate interstate commerce,

and so is unconstitutional, is without merit. The allegations of the complaint clearly establish that as to the transaction now before the court it is one arising and involving goods wholly located within this state. Although the terms of the statute are broad, and could conceivably be interpreted to include interstate transactions, we must necessarily construe the act as applying only to transactions within the state, that being the sole territorial exent of the legislature's powers. (California Adjustment Co. v. Atchison, Topeka & Sante Fe Ry. Co., 179 Cal. 140, 175 Pac. 682; American Banana Co. v. United Fruit Co., 213 U. S. 347, 29 Sup. Ct. Rep. 511.)

Respondent presents several hypothetical situations under which enforcement of the act would be inequitable or difficult, or, perhaps, even unconstitutional. It is elementary, of course, that a statute may be invalid as applied to one set of facts, yet valid as applied to another. (Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 Sup. Ct. Rep. 106). The situations conjured up by respondent are not here involved, and respondent is limited in his attack to the application of the statute to the factual situation now before the court. Moreover, the principal remedy granted by the statute is injunctive relief. The equity court has broad and flexible discretionary powers, and can, and undoubtedly would, deny injunctive relief where such relief would be inequitable.

It is beyond denial that, under our form of government, the use of property and the making of contracts are normally matters of private concern. Here, no question of impairment of existing contracts is involved. No criminal proceedings have arisen under the circumstances of the case. The plaintiffs are seeking, in a civil action, to restrain conduct on the part of the defendant which the legislature, in determining a question of economic policy, has declared to be "unfair competition, and actionable at the suit of any person damaged thereby". We are of the view that its action, measured by the yardstick of the cases cited, and other authorities of similar import, must be held to be free from constitutional objections, and, not being shown to be unreasonable or arbitrary, it must be sustained as a proper legislative declaration of the policy of the state on the practice of price-cutting. The demurrer of defendant to the complaint should have been overruled.

For the foregoing reasons, the judgment entered on the order sustaining the demurrer without leave to amend is reversed.

Waste, C. J.

We concur: Curtis, J. Langdon, J. Seawell, J.

IN SUPREME COURT OF CALIFORNIA

DISSENTING OPINION

I dissent. I cannot bring myself to agree with the majority opinion in this case. The question herein is not whether the court or the legislature is authorized to determine the wisdom of an economic policy. It is, of course, elementary that it is beyond the function of the court to attempt to define or limit the economic policy or to determine the wisdom of a chosen course by the state. And it is also fundamental that simply because such determination does not fall within the judicial function it does not follow that it belongs in the legislative field. It may be reserved by the state Constitution to the people, or the state may be prevented from acting by the inhibition of the federal Consitution. The question, then, in this case may be phrased as follows: Has the legislature exceeded its powers as limited by some inhibition of the Constitution in which the people have defined for themselves an economic policy and in which they have set up a safeguard against the infringement by the legislature of some natural right with which they are endowed? If the act in question exceeds the legislative power thus measured, it is likewise beyond the judicial function to sap the inhibition or safeguard of its essential vitality, by construction, in order to accomplish or permit a course of action the court may deem to constitute a wise economic policy. (See opinion of Mr. Justice Burnett in Ex parte Newman, 9 Cal. 502, 510, for a comprehensive statement of this principle.) The respondent insists that the section brought under our scrutiny in this cause does do violence to sections 1 and 13 of article I and section 25 of article IV of our state Constitution, as well as the fourteenth amendment to the federal Constitution. It seems to me the argument in this regard is unanswerable. Section 1 of article I reads as follows: "All men are by nature free

and independent, and have certain inalienable rights among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness." Section 13 of the same article provides that no person shall "be deprived of life, liberty or property without due process of law", which is, of course, in keping with a portion of the fourteenth amendment to the federal Constitution. Section 25 of article IV forbids the enactment of special laws respecting enumerated subjects or where a general law can be made applicable.

Sections 1 and 13 of the first article have been considered by this court in previous cases, and I believe if the amendment under attack is to be sustained, they must be directly overruled or the court forced to the extent of saying all trade-marked goods, including the specific item of cosmetics here involved, have been so devoted to a public use that they have become "affected with a public interest". I can scarcely believe that anyone would adopt the latter alternative. Hence I advert to the construing authorities. It was held in the early case of Ex parte Newman, to which I have already referred, that the declaration of principles contained in article I, and which were intended for the protection of every individual, "can be enforced by judicial determination". In Ex parte Quarg, 149 Cal. 79, this court proceeded to enforce the section upon which the respondent relies for his protection. With respect to an enactment which attempted to prohibit the sale of theater tickets at a price in excess of that originally charged, it is there said: "The constitutional guaranty securing to every person the right of 'acquiring, possessing and protecting property' refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and, in connection with the right of personal liberty, *it includes the right to dispose of such property* in such innocent manner as he please, and *to sell it for such price as he can obtain in fair barter*" (italics added). To the same practical effect is Ex parte Dickey, 144 Cal. 234, in which we find this expression: "This right of contract common to the followers of all legitimate vocations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed pro-

tection by the Constitution. By the act in question he is arbitrarily stripped of this right of contract, and deprived [fol. 31] of his property, and left, in following his vocation and in pursuit of his livelihood, circumscribed and hampered by a law not applicable to his fellow men in other occupations." (See, also, In re Smith, 193 Cal. 337.) Again in People v. Pace, 73 Cal. App. 548, after approving the language which we have quoted from Ex parte Quarg, it was held that the legislature could not require a person to secure a permit as a condition precedent to the sale of his own stock, although in repeated and successive transactions. The court said: "In these days when the urge is strong upon legislative bodies to extend the paternal arm of government into the realm of economic activities, it is particularly important that courts in the exercise of the particular functions imposed upon them by the Constitution, should scrutinize with care legislation which tends to encroach upon the constitutional guaranties, to the end that the right of the individual to liberty and possession of property shall become, not a mere theory, but shall be maintained as a practical reality. And while it is true that the increasing conflict between the rights of the individual and the general welfare of society presents ofttimes difficult and perplexing problems, nevertheless courts should not and will not permit the violation of those most fundamental rights that underlie our very existence as a nation. (Dobbins v. Los Angeles, 195 U. S. 223, 49 L. Ed. 169, 25 Sup. Ct. Rep. 18, see, also, Rose's U. S. Notes; Pacific Palisades Ass'n. v. City of Huntington Beach, et al., 196 Cal. 211, 40 A. L. R. 782, 237 Pac. 536.)"

There are a host of authorities from other jurisdictions which might be cited to the same effect, but for my purposes it will be sufficient to refer to but two. First we find comparable language in the case of Tyson Bros.-United Ticket Office v. Branton, 273 U. S. 418, as follows: "In the endeavor to reach a correct conclusion in respect of this inquiry it will be helpful by way of preface to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, case of the State Freight Tax, 15 Wall. 232, 278; and as such, within the protection of the due process of law clauses of the fifth and fourteenth amendments. See City of Car-

rollton v. Bazzette, 159 Ill. 284, 294, 31 L. R. A. 522, 42 N. E. 837." Second I refer to Doubleday, Doran & Company, Inc. v. R. H. Macy & Co., Inc., 199 N. E. 409, which case involved a practically verbatim copy of the section here involved, adopted by the legislature of New York. Bearing in mind that the New York Court of Appeals was the same court which first sustained the New York Milk Control Act (People v. Nebbia, 262 N. Y. 259), which was the subject of judicial inquiry in the case of Nebbia v. New York, from which the majority opinion has quoted so extensively, the expressions we find in the case are especially illuminating. It is there said: "That the States cannot fix the selling price of any and all commodities has been settled. (Williams v. Standard Oil Co., 278 U. S. 235, 49 S. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596; Tyson & Bro. v. Banton, 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 718, 58 A. L. R. 1236; Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 128; Straus v. Victor Talking Machine Co., 243 U. S. 490, 37 S. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E., 1196, Ann. Cas. 1918A. 955.)

"Books, at least these books, are not 'affected with the public interest' any more than theater tickets. No emergency has yet arisen in literary publications and the business is not such as comes within the class which must submit to rate fixing. Circumstances which cannot be foreseen from one generation to another may arise which will require certain articles to submit to regulatory prices in order that the public may get them at all or get them in a pure and beneficial state. We cannot always express legislative power in exact formulas nor decide a case before it happens. Experience is the mother of teachers. Under the Nebbia case, for instance (Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469), no one would doubt now that New York state would have the power to get milk to the public somehow if any combination of forces threatened to shut off all supply or to deteriorate that which was supplied. The price might be an element to be considered with other things in such a case. So we thought in People v. Nebbia, 262 N. Y. 259, 186 N. E. 694, but to fix arbitrarily the price of books by legislation and not by agreement comes within the condemnation of the decisions which have heretofore dealt with like legislation. What the Legislature cannot do directly, it cannot do indirectly, nor does it cease

to be a price fixed by the Legislature because that body has clothed the publisher with the power or authority to establish it." I think it so fundamental and so well established that the right to sell at any price obtainable by the owner is a part of the property itself and within the protection of the constitutional guaranties that I shall not devote more space to that thought.

However, it must be considered that there is a factor which takes some kinds of businesses outside of the strict protection of the inhibition, and to an ascertainment or rather statement (because it has heretofore been well explained and adhered to) of that element I now turn. What is it? For the purposes of a ready statement we say that where a business is "affected with a public interest" it is subject to regulatory measures. Just what is meant by the expression is well stated in Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 535, as follows: "Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes.

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of ins, cabs and grist mills. (State v. Edwards, 86 Mo. 102, Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, 254.)

"(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."

Again it is said therein (p. 536): "In a sense, the public is concerned about all lawful business because it contributes [fol. 32] to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of Munn v. Illinois and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public."

Making the meaning of the unanimous court still more clear, the author of the opinion says (p. 537): "An ordinary producer, manufacturer, or shopkeeper may sell or not sell, as he likes United States v. Trans-Missouri Freight Association, 166 U. S. 290, 320; Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, 256, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, German Alliance Ins. Co. v. Lewis, 233 U. S. 389, it usually distinguishes private from quasi-public corporations.

"In nearly all the business included under the third head above, the thing which gave the public interest *was the indispensable nature of the service and the exorbitant charges and the arbitrary control to which the public might be subjected without regulation.*" (Italics added.)

To revert to the case of Tyson & Bro. v. Banton, supra, for a moment we find apt language describing the expression as follows (p. 430): "The authority to regulate the conduct of a business or to require license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238, 246, but exists only where the business or the property involved has become 'affected with a public interest.' * * *

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance.

Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood.''

It can hardly be denied that the public is interested in the maintenance and continuity of the oil business, particularly as the same relates to the sale of gasoline and lubricating oils. And yet the Supreme Court of the United States denied the power of the legislature to regulate the price in the case of Williams v. Standard Oil, 278 U. S. 235, 239, saying in part as follows: ''It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.' * * * By repeated decisions of this court, beginning with Munn v. Illinois, 94 U. S. 113, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property or services must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. * * * Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. * * *

''In support of the act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the State of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the State. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from

a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest.'" I might add other authorities in which the legislative power has been denied, but there has never been a departure from the announced principle. Even in the case of Nebbia v. New York, supra, to which reference has been made, the court justifies its conclusion by the fact that milk was indispensable and that it was easily contaminable; that in order to secure pure and wholesome milk for the public during the emergency which the legislature declared to exist it was necessary for the state to take control. The facts of the case when studied reveal that the comfort claimed to be found by appellant in the opinion does not in truth exist. And here I desire to point out a fallacy involved in the majority opinion. The language quoted is taken from cases involving businesses "affected with a public interest" as hereinbefore defined, or from authorities dealing with the health or public safety. The result is that the language, lifted from its context and placed in a different setting, takes on a meaning altogether foreign to that which it originally possessed.

Nor can it be seriously contended that the amendment is not a price-fixing statute. It fixes the price indirectly and it has this additional vice, that it leaves the fixed price to the dictates of the producer—in other words, the legislature has, as said in the Doubleday-Doran case, attempted to delegate authority to the producer of a trade-marked article to set the retail price. No one can object to the contract which he may enter into, but to make this contract binding by legislative fiat as to retail price upon persons who are not privy thereto violates every principle guaranteed the individual by the constitutional guaranties. The element of knowledge on the part of the seller is a minor factor, provided very simply by notice on the goods or label. It is manifest that the act here in question was not based upon the public interest, or that the consumer was considered. Its effect is to grant to the producer a privilege and preference unwarranted by the basic law. Not only that—but seeking to justify its enactment upon the theory that it is designed to prevent price cutting which injures a competi-

tor, it reaches all merchants who, though they may be satisfied with a smaller profit than others engaged in the busi- [fol. 33] ness, or who by reason of a greater efficiency are able to sell at lower prices and yet make the same profit, are still compelled to exact from the consumer a fixed retail price. It strikes at every merchant alike, regardless of intention, who desires to manage and control his own business. It is thus made perfectly clear that the object of the act is not to prevent unfair competition but to fix prices. Such being its purpose and operation, it falls under the condemnation of cases involving similar efforts, such as Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, and the other cases already cited.

But the amendment has other fatal defects. A study of the authorities which deal with the regulation of businesses, both those which sustain and those which reject the claim of legislative power, reveals that the question of whether all the surrounding circumstances have operated to change the status of a private business free from legislative regulation into one in which the public has an interest is one for judicial inquiry and determination (Wolff Packing Co. v. Court of Industrial Relations, supra). But the act here in question attempts to lump all businesses into a common regulatory basket, provided only that the product is trademarked and is originally in competition.

I have already mentioned the fact that the legislature has attempted to delegate the price-fixing power to the producer or manufacturer. Before concluding, I wish to direct attention to the almost obvious and inescapable fact that there is no authority in the law for such action. A person may not be bound with respect to his property by the action, whim or caprice of another, particularly where the latter is not vested with any official responsibility or duty. The delegation of such power is contrary to the fourteenth amendment to the federal Constitution. (Washington v. Roberge, 278 U. S. 116; Panama Refining Co. v. Ryan, 293 U. S. 388, 55 Sup. Ct. Rep. 241.) Of course, I concede the producer's right to sell or not to sell at his own price, but when his property has been sold and passed into hands not hampered by contractual covenants the producer's control and right therein has altogether ceased. It takes no great amount of imagination to visualize the discriminatory prac-

tices and abuses which might be indulged were the power of the producer to establish a fixed retail price upheld.

Since the preparation of the foregoing opinion I have read the dissenting opinion by Mr. Justice Shenk and desire to express my concurrence therein.

The judgment should be affirmed.

Thompson, J.

IN SUPREME COURT OF CALIFORNIA

DISSENTING OPINION

In concurring in the dissent of Mr. Justice Thompson I desire to comment on certain matters not touched upon in his opinion. In the first place let me point out that the particular statute under attack should not be confused with the Unfair Practices Act of 1935 (Stats. 1935, p. 1546), which denounces unfair competition and so-called piratical trade transactions, and was designed to afford full relief against such abuses on behalf of anyone aggrieved. That act is said to have been passed at the behest of the business interests of the state, including the manufacturer, middleman and retailer. While the validity of that statute has not been passed upon by this court is is enough to say for present purposes that it appears to be a painstaking endeavor by the legislature to combat the abuses which the business interests have deemed unfair practices in the competitive field. It appears to have been designed to permit fair competition to function under its own economic laws.

The act now under attack as originally passed in 1931 was confined to the field of contract in the fixing of prices by agreement as between manufacturer, jobber and retailer, and when so limited no valid objection to it has been pointed out. It is the amendment of 1933 which makes the prices so fixed binding on all who are not parties to the contract. In other words, it places within the power of the manufacturer or producer to fix the retail price of all commodities regardless of their reasonableness. It does not purport to denounce unfair competition alone, but affects fair competition as well. Carried to its length it would enable the manufacturer or producer to destroy all competition and thus place the consumer at their uncontrolled

mercy even as to food, clothing and all commodities which are the subject of manufacture or production. This, too, without regard to serious marketing problems which have confronted some of the basic industries of the state. It is said that whether these results should follow is an economic problem with which the courts have nothing to do. But it is the business of the courts to see to it that, in carrying out any such program, the fundamental and guaranteed rights of the citizen to deal with his property as he chooses, subject to such reasonable regulations as may properly be imposed, are not destroyed. The statute under attack does not regulate. It prohibits. It is essentially a price-fixing statute. To me it is beyond question that the legislature itself could not fix the retail prices of all or any commodities not affected with a public interest or clothed with a public use. We are bound by the decisions of the Supreme Court of the United States on that subject, as pointed out in the opinion of Mr. Justice Thompson. If the legislature itself is without power to fix the retail price of such commodities, how then can it delegate that power to one who is governed by no power except his own self interest?

It is said in the majority opinion that the statute under attack is confined to retail prices of trade-marked or branded commodities; that this is a valid classification and that the legislature has the right to single out commodities so marked as a proper subject of preferment. This is not so, for the reason that there is no limitation on the acquisition of trade-marks and brands, except the ingenuity, or lack of it, but aided by prize contests, on the part of the manufacturer or producer in conjuring up names to suit his purposes. He then may acquire an exclusive right to the name under sections 3196-3202 of the Political Code. Under this easy plan all commodities, essential or otherwise, may be trade-marked or branded. It does not follow that because the right to the use of the name is exclusive, the right to shackle the commodity with a retail price is vested in the owner of the name regardless of where the commodity may find itself in the channels of trade, divorced from any contractual relation with the owner of the name.

As to the price-fixing feature of the statute the highest court in the land has spoken in terms which I feel bound to respect. Also, the state of New York enacted the same statute now under attack. The highest court of that state

recently and correctly held it void under the Federal Constitution. In deference to what I deem to be the established law I arrive at the same conclusion.

Shenk, J.

[fol. 34] IN SUPREME COURT OF CALIFORNIA

L. A. No. 14662. In Bank

[Title omitted]

ORDER DENYING PETITION FOR REHEARING AND MODIFYING JUDGMENT—March 26, 1936

By the COURT:

The petition for a rehearing is denied.

The judgment heretofore rendered is modified as follows: Strike out the last two lines in the opinion, and insert in lieu thereof, the following: "The judgment entered on the order sustaining the demurrer without leave to amend is reversed, and respondent having filed an election to stand on its demurrer, it is ordered that the trial court enter judgment in the within cause in favor of the appellants as prayed for in its complaint."

[fol. 35] IN SUPREME COURT OF CALIFORNIA

LOS ANGELES

Bank. No. 14662

MAX FACTOR & Co. (a Corp.), and SALES BUILDERS, INC., (a Corp.), Plaintiffs, Appellants,

vs.

CLARENCE G. KUNSMAN, Defendant, Respondent

On Appeal from the Superior Court in and for the County of Los Angeles. Superior Court #363006

JUDGMENT—March 26, 1936

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all

and singular the law and premises having been fully considered,

It is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court in and for the County of ——, in the above entitled cause, entered on the order sustaining the demurrer without leave to amend is reversed, and the respondent having filed an election to stand on its demurrer, it is ordered that the trial court enter judgment in the within cause in favor of the appellants as prayed for in its complaint. Appellants to recover their costs on appeal.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 36] [File endorsement omitted]

[fol. 37] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 11, 1936

To the Chief Justice of the Supreme Court of the State of California:

Your petitioner, Clarence K. Kunsman, respectfully shows:

That your petitioner is the appellant in the above entitled cause and the defendant and respondent in the case below. That on or about the 2nd day of January, 1934, appellees filed their amended complaint against appellant in the Superior Court of the State of California, in and for the County of Los Angeles, stating an alleged cause of action against appellant based upon his alleged violation of Section 1½ of a statute of the State of California, entitled "An Act To Protect Trademark Owners, Distributors and the Public Against Injurious and Uneconomic Practises in the Distribution of Articles of Standard Quality Under a [fol. 38] Distinguished Trademark, Brand or Name", which act is commonly known as the "Fair Trade Act" (Stats. of California 1931, Chapter 278, as amended by the addition of Section 1½ of said Act, Stats. of California 1933, Chap-

ter 260), and praying for an injunction to restrain appellant from continuing to violate said section of said Act. Said Act, as amended, will be hereinafter for convenience referred to as the "Fair Trade Act".

That appellant demurred to said complaint on the ground that it failed to state a cause of action, in that Section 1½ of the Fair Trade Act is unconstitutional and repugnant, both to the Constitution of the State of California and the Constitution of the United States, and, more particularly, that said amendment to said Act is in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant of property and liberty without due process of law. The Superior Court thereupon rendered a judgment in favor of appellant upon an order sustaining, without leave to amend, appellant's demurrer to appellee's complaint and refusing to issue the injunction prayed for, basing said judgment upon the ground that Section 1½ of the Fair Trade Act violates the Constitution of the State of California and also violates and is repugnant to the Fourteenth Amendment of the Constitution of the United States.

[fol. 39] That the appellees thereupon filed notice of appeal to the Supreme Court of the State of California, and briefs having been filed on behalf of appellees and appellant, the case duly came on for hearing before said Supreme Court of the State of California on September 11, 1935, at which time, after oral argument, the case was submitted to said Court for decision. That on February 27, 1936, said Supreme Court of the State of California rendered its decision in the above entitled cause, holding that Section 1½ of the Fair Trade Act was constitutional, both under the State and Federal Constitutions, and reversed the judgment of the trial court, entered on the order sustaining appellant's demurrer to the complaint, without leave to amend.

That on the 18th day of March, 1936, appellant filed with the Supreme Court of the State of California a petition for rehearing of said cause. That on the 25th day of March, 1936, appellant filed a supplement to said petition for rehearing in which appellant stated that he elected to stand upon his demurrer. That said petition for rehearing was denied by the Supreme Court of the State of California on

the 26th day of March, 1936, at which time said Court modified its opinion by ordering the trial court to enter final judgment for the appellees by reason of appellant's elec-
[fol. 40] tion to stand upon his demurrer.

That the Supreme Court of the State of California is the highest court of said state in which a decision in this suit can be had.

That in said cause there is drawn in question the validity of a statute of the State of California on the ground that said statute is repugnant to the Constitution and laws of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute violates the Fourteenth Amendment of the Constitution of the United States.

That, therefore, in accordance with Section 237(a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to-wit: under Section 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the
[fol. 41] jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Supreme Court of the State of California, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of California may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of California, under his hand and seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the

security to be required of the petitioner, and that the supersedeas bond tendered by the petitioner be approved.

Dated At Los Angeles, California, this 5th day of May, 1936.

Jules C. Goldstone, William Berger, Attorneys for Petitioner.

[fol. 42] [File endorsement omitted]

[fol. 43] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 11, 1936

Now comes the appellant in the above numbered and entitled cause and says that there are errors in the record and proceedings of the above entitled cause and for the purpose of having the same reviewed in the United States Supreme Court assigns the following errors in the record and proceedings in this cause:

1. That the Supreme Court of the State of California erred in reversing the judgment of the Superior Court of the State of California, entered on the order sustaining appellant's demurrer to appellees' complaint, without leave to amend, and in thereby holding constitutional, Section 1½ of a statute of the State of California entitled "An Act to Protect Trademark Owners, Distributors and the Public Against Injurious and Uneconomic Practices in the Distribution of Articles of Standard Quality Under a Distinguished Trademark, Brand or Name", which act is com-[fol. 44] monly known as the "Fair Trade Act" (Stats. of California 1931, Chapter 278, as amended by the addition of Section 1½ of said act, Stats. of California 1933, Chapter 260).

2. That the Supreme Court of the State of California erred in failing to render judgment in favor of appellant, affirming the judgment entered on the order of the trial court sustaining appellant's demurrer to appellees' complaint, without leave to amend.

3. That the Supreme Court of the State of California erred in failing to hold that Section 1½ of said Fair Trade

Act violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant of his property without due process of law.

4. That the Supreme Court of the State of California erred in failing to hold that Section 1½ of said Fair Trade Act violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant of his liberty without due process of law.

Wherefore, on account of the errors hereinbefore as-[fol. 45] signed, petitioner prays that said judgment of the Supreme Court of the State of California in the above entitled cause, dated the 27th day of February, 1936, as modified by the order of said Court, dated the 26th day of March, 1936, be reversed and a judgment entered in favor of the appellant.

Dated this 5th day of May, 1936.

Jules C. Goldstone, William Berger, Attorneys for Appellant.

[fol. 46] [File endorsement omitted]

[fol. 47] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 11, 1936

The petition of Clarence G. Kunsman, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of California, having been filed with the Clerk of this Court and presented herein, accompanied by assignments of error and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be, and it is hereby, allowed to the Supreme Court of the United States from the judgment of the Supreme Court of the State of California, dated the

27th day of February, 1936, as modified and made final by the order of said Court, dated the 26th day of March, 1936, [fol. 48] as prayed in said petition, and that the Clerk of the Supreme Court of the State of California shall, within sixty (60) days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is Further Ordered that the said appellant shall give a good and sufficient supersedeas bond, in the sum of

2500.00

W. H. W. Twenty-five Hundred Dollars ($[500.00]*), that said appellant shall prosecute said appeal to effect and answer all costs and damages if he fails to make his plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate herein and of all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

Dated this 11th day of May, 1936.

William H. Waste, Chief Justice of the Supreme Court of the State of California.

[fols. 49-53] Citation, in usual form, showing service on Henry Haves, filed May 18, 1936, omitted in printing.

[fol. 54] [File endorsement omitted]

[fol. 55] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE AND STIPULATION AS TO RECORD—Filed May 18, 1936

To the Clerk of the Supreme Court of the State of California:

In accordance with Rule 10, paragraph 2, of the Rules of this Court, appellant herewith presents this præcipe to

---

[* Matter in brackets struck out in copy.]

indicate the portions of the record to be incorporated into the transcript in this appeal.

1. The entire transcript of this case on appeal in the Supreme Court of the State of California, except the Clerk's certificates to the judgment roll and transcript, consisting, more particularly, of the following papers:

(a) The amended complaint with all exhibits thereto.
(b) Demurrer to amended complaint.
[fol. 56] (c) Minute order.
(d) Judgment.
(e) Notice of appeal.

2. Judgment and opinion in said case (including dissenting opinions) of the Supreme Court of the State of California.

3. Order of the Supreme Court of the State of California denying petition for rehearing and modifying judgment.

4. Petition for appeal to this Court.

5. Order allowing appeal to this Court.

6. Citation to appellees with proof of service.

7. Assignment of errors to this Court.

8. Statement of jurisdiction of this Court.

9. Proof of service and statement directing appellees' attention to Rule 12, Paragraph 3 of the Rules of this Court.

10. Supersedeas bond filed by appellant herein.

Dated this 13th day of May, 1936.

Respectfully submitted, Jules C. Goldstone, William Berger, Attorneys for Appellant.

[fol. 57] It is hereby stipulated by and between the parties in the above entitled cause that the papers herein enumerated shall be the portions of the record in this case to be incorporated into the transcript on this appeal.

Dated this 13th day of May, 1936.

Henry Haves, Attorney for Appellee. Jules C. Goldstone, William Berger, Attorneys for Appellant.

[fol. 58] [File endorsement omitted]

[fols. 59-129] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION FOR INCLUSION OF ADDITIONAL PAPERS IN THE TRANSCRIPT ON APPEAL—Filed May 21, 1936

It is stipulated between the parties hereto, by and between their respective attorneys, that the following papers, in addition to those enumerated in the Præcipe heretofore filed herein, may be included in the transcript on appeal.

1. Copy of Remittitur.
2. Stipulation waiving supersedeas bond and approving Five Hundred Dollar ($500.00) cost bond.
3. Order dispensing with supersedeas bond and approving Five Hundred Dollar ($500.00) cost bond.
4. Cost bond.
5. Præcipe, with stipulation attached thereto, heretofore filed herein.
6. This stipulation.

Dated: This 20th day of May, 1936.

Jules C. Goldstone, William Berger, Attorneys for Appellant. Henry Haves, Attorney for Appellees.

[fol. 130] [File endorsement omitted]

[fol. 131] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION WAIVING SUPERSEDEAS BOND AND APPROVING $500.00 COST BOND—Filed May 21, 1936

It appearing that on May 11, 1936, an order was made herein, allowing an appeal by the above Appellant to the Supreme Court of the United States, and it further appearing that by the terms of said order Appellant was required to give a good and sufficient supersedeas bond in the sum of Two Thousand Five Hundred Dollars ($2,500.00), that said Appellant should prosecute said appeal to effect and answer all costs and damages if he failed to make his plea good, and it appearing that the parties hereto desire to

waive the requirement that Appellant shall give such supersedeas bond in connection with the allowance and prosecution of the within appeal; Now, Therefore,

It is Hereby Stipulated, that said supersedeas bond hereinabove referred to, be, and the same hereby is, waived, and that the appeal herein may operate as a supersedeas without the filing of such supersedeas bond; to the same force and *affect* as if such bond had been filed.

It is Further Stipulated, that a cost bond in the sum of [fol. 132] Five Hundred Dollars ($500.00) is satisfactory to the parties hereto and is hereby approved.

It is Further Stipulated that the Chief Justice of the Supreme Court of the State of California may make an appropriate order, pursuant to the provisions of this stipulation.

Dated this 20th day of May, 1936.

Jules C. Goldstone, William Berger, Attorneys for Appellant. Henry Haves, Attorney for Appellees.

[fol. 133] [File endorsement omitted]

[fol. 134] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER DISPENSING WITH SUPERSEDEAS BOND AND APPROVING COST BOND IN THE SUM OF $500.00—Filed May 21, 1936

Upon reading the stipulation of the parties to the above action, waiving the supersedeas bond heretofore fixed in connection with the allowance and prosecution of the within appeal and approving a cost bond in the sum of $500.00, and good cause appearing therefor;

It is Hereby Ordered, that the supersedeas bond in the sum of Two Thousand Five Hundred Dollars ($2,500.00), heretofore fixed in the order allowing the appeal herein, be, and the same hereby is, dispensed with;

It is Further Ordered, that said order allowing the appeal be, and the same hereby is, amended so as to eliminate therefrom the requirement that Appellant shall furnish such supersedeas bond in connection with said appeal, and that said appeal shall operate as a supersedeas, to the same force and *affect* as if such supersedeas bond had been filed.

It is Further Ordered, that said Appellant shall give a good and sufficient cost bond in the sum of Five Hundred

Dollars, that said Appellant shall prosecute said appeal to [fol. 135] effect and answer all costs, if he fails to make his plea good.

Dated this 21st day of May, 1936.

William H. Waste, Chief Justice of the Supreme Court of the State of California.

Service acknowledged, and approved as to form.
Dated this 20th day of May, 1936.

Henry Haves, Attorney for Appellees.

[fols. 136-139] Bond on appeal for $500.00, approved and filed May 21, 1936, omitted in printing.

[fol. 140] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 141 & 142] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed May 27, 1936

Comes now the appellant in the above entitled cause and adopts his assignments of error as his statement of the points to be relied upon and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated this 23d day of May, 1936.

Jules C. Goldstone, William Berger, Attorneys for Appellant.

[fol. 143] Service of the foregoing Statement of Points to be Relied upon and Designation of Parts of Record to be Printed is hereby acknowledged this 25th day of May, 1936.

Henry Haves, Attorney for Appellees.

[fol. 144] [File endorsement omitted.]

Endorsed on cover: File No. 40617. California Supreme Court. Term No. 79. Clarence G. Kunsman, appellant, vs. Max Factor & Co., and Sales Builders, Inc. Filed May 25, 1936. Term No. 79, O. T., 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 1063

CLARENCE G. KUNSMAN,

Appellant,

vs.

MAX FACTOR & CO., A CORPORATION, AND SALES BUILDERS, INC., A CORPORATION,

Appellees.

STATEMENT OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Pursuant to the provisions of Section 1, of Rule 12, of the Revised Rules of the Supreme Court of the United States, Appellant respectfully submits herewith this statement of the jurisdiction of said Supreme Court of the United States in the above entitled cause, and respectfully shows:

I.

The Statutory Provisions Which Appellant Contends Sustain the Jurisdiction of This Court to Review the Judgment in the Within Cause Upon Appeal.

That 45 Stats. 54, Chapter 14, Section 1, enacted January 31, 1928 (U. S. C. A., Title 28, Section 861a), provides that

the writ of error is abolished and that relief theretofore obtainable by writ of error shall thereafter be obtainable by appeal.

That 45 Stats. 54, Chapter 14, Section 2, as amended April 26, 1928, by 45 Stats. 466, Chapter 440 (U. S. C. A., Title 28, Section 861b), provides that the statutes regulating the right to a writ of error shall be applicable to the appeal which the statute hereinabove referred to, substitutes for the writ of error.

That Rule 46, paragraph 2, of the Rules of the United States Supreme Court provides that an appeal may be allowed to this Court where the case is one permitting an appeal by writ of error under the legislation in force when the act abolishing the writ of error was adopted.

That under Judicial Code, Section 237(a), as amended to February 13, 1925, by 43 Stats. p. 937, Chapter 229, Section 1 (U. S. C. A., Title 28, Section 344(a)), said act being the legislation in force governing the use of the writ of error at the time said writ of error was abolished on January 31, 1928, a writ of error was available for review of a final judgment or decree in a suit in the highest court of the State in which a decision in the suit could be had, where there is drawn in question the validity of the statute of any State on the ground that it is repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity, and that in such case the writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States and the Supreme Court of the United States may reverse, modify or affirm the judgment or decree of such State court and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

II.

The Statute of the State of California, the Validity of Which is Involved in This Appeal.

That your petitioner respectfully shows that the instant case is one in which, under the legislation hereinabove referred to, a review could be had in the Supreme Court of the United States as a matter of right, in that there is drawn in question the validity of Section 1½ of a statute of the State of California known as the Fair Trade Act (Stats. of California, 1931, Chapter 278, Page 583, as amended by the addition of Section 1½ thereto, Stats. of California, 1933, Chapter 260, Page 793), upon the ground that said statute is repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States. The content of said act, together with said amendment, is herewith set out verbatim:

> "An act to protect trademark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name.
>
> (Approved May 8, 1931, Stats. 1931, p. 583. In effect August 14, 1931.)
>
> 1. Certain sale contracts declared lawful.
> 2. Exception.
> 3. Definition.
> 4. Constitutionality.
> 5. Short title.
>
> "1. Certain Sale Contracts Declared Lawful.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any

law of the state of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

"2. Exception.—This act shall not apply to any contract or agreement, between producers or between wholesalers or between retailers as to sale or resale prices.

"3. Definitions.—The following terms, as used in this act, are hereby defined as follows:

'Producer' means grower, maker, baker, manufacturer or publisher.

'Commodity' means any subject of commerce.

"4. Constitutionality.—If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

"5. Short title.—This act may be known and cited as the 'Fair Trade Act'."

Section 1½ of said Fair Trade Act, being the provision whose constitutionality is here involved, was added in 1933 (Stats. 1933, Chapter 260, page 793) and provides as follows:

> "Sales below contract price.—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

III.

The Case is Within the Jurisdictional Provisions on Which Appellant Relies.

The nature of the above entitled cause in the trial court, was an action for an injunction instituted by the appellees under Section 1½ of said Fair Trade Act, to restrain appellant, a retail drug merchant, from knowingly selling certain trademarked commodities manufactured by appellee, Max Factor & Co., at a price less than the price fixed by appellees for similar commodities, in contracts entered into between appellees and third persons. Appellant was not a party to such contracts. Appellant raised the objection that said Section 1½ of the Fair Trade Act was unconstitutional, by filing a general demurrer to appellees' complaint. A hearing on said demurrer was had and the trial court thereupon made its order sustaining appellant's demurrer, without leave to amend, on the ground that Section 1½ of the Fair Trade Act violated the Fourteenth Amendment to the Constitution of the United States. Judgment on said order was entered by the trial court on February 5, 1934. Appellees thereupon appealed from said judgment, to the Supreme Court of the State of California, and on

February 27, 1936, said Supreme Court of the State of California rendered judgment reversing the judgment entered by the trial court on the order sustaining appellant's demurrer without leave to amend. Appellant thereupon filed with said Supreme Court of the State of California, a petition for rehearing of said cause. Said petition for rehearing was denied by said Supreme Court of the State of California on the 26th day of March, 1936, at which time said court modified its opinion by ordering the trial court to enter final judgment for the appellees by reason of appellant's election to stand upon his demurrer. The Supreme Court of the State of California, in reversing said judgment of the trial court, as aforesaid, ruled that Section 1½ of the Fair Trade Act was constitutional, and that it did not deprive appellant of his liberty or property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The opinions of the Supreme Court of California are printed as an appendix to the Statement as to jurisdiction in the case of *The Pep Boys, etc.* v. *Pyroil Sales Co. Inc.*, No. 1024, October Term, 1935, and in the interest of brevity are not repeated here. That the Supreme Court of the State of California is the court of last resort in all causes heard in the State of California, and that said court has heard and rendered its final judgment in the within cause.

IV.

The Federal Question Involved is a Substantial One.

The Federal question involved herein is a substantial one and is neither frivolous nor moot. Section 1½ of the Fair Trade Act which appellant alleges to be unconstitutional, vitally affects the liberty and property rights of almost every resident of the state, including manufacturers, wholesalers, distributors, retailers and the consumer public.

It raises the question of the right of a person to sell his own property at prices of his own choosing.

The New York Court of Appeals, in *Doubleday, Doran & Co., Inc.*, v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272, 199 N. E. 409, decided January 7, 1936, declared unconstitutional under the Federal constitution, a statute of the State of New York which is virtually identical with the statute involved in the present case. The conflict of decisions on this important Federal question by the highest courts of these two states has tended to create uncertainty and confusion among business men and the consumer public throughout the nation, and will tend to give rise to a multiplicity of suits unless the Federal question involved is decided by the highest court of the land.

V.

The Cases Which Appellant Believes Sustain the Jurisdiction of This Court.

A. The United States Supreme Court has jurisdiction of a cause wherein a real and substantial Federal question is involved.

U. S. Fidelity & Guaranty Co. v. *Oklahoma*, 250 U. S. 111, 39 Sup. Ct. 399, 63 L. Ed. 876;

Zucht v. *King*, 260 U. S. 174, 43 Sup. Ct. 24, 67 L. Ed. 194;

Milheim v. *Moffat Tunnel Imp. Dist.*, 262 U. S. 710, 43 Sup. Ct. 694, 67 L. Ed. 1194.

B. Where the highest court of a State affirms or denies the validity of a judgment of an inferior court over which it exercises appellate authority, this Court has jurisdiction to review such decision, if it involves a Federal question.

Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. *Rock*, 279 U. S. 410, 49 Sup. Ct. 363, 73 L. Ed. 766;

Williams v. *Bruffy*, 102 U. S. 248, 26 L. Ed. 135.

C. A judgment is final if it disposes of the whole case on the merits, directs what judgment should be entered, and leaves nothing to the judicial discretion of the trial court.

Rio Grande Western Ry. Co. v. *Stringham,* 239 U. S. 44, 36 Sup. Ct. 5, 60 L. Ed. 136;

Board of Commissioners, etc., v. *Lucas,* 93 U. S. 108, 23 L. Ed. 822.

Respectfully submitted,

JULES C. GOLDSTONE,
WILLIAM BERGER,
Attorneys for Appellant.

(7834-C)

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

November Term, 1936
No. 79.

Clarence G. Kunsman

vs.

Max Factor & Co., and Sales Builders, Inc.,

APPELLANT'S BRIEF.

STATEMENT OF FACTS.

A. Origin and Nature of the Cause.

This is an appeal from a decision of the Supreme Court of the State of California, rendered in *Max Factor & Co. et al. v. Kunsman,* ..... Cal. .....; 91 Cal. Dec. 345; 55 Pac. (2d) 177.

Appellees filed an action against appellant under Section 1½ of the California Fair Trade Act (Stats. of Cal. 1931, chapter 278, page 583, as amended by Stats. of Cal. 1933, chapter 260, page 793) for an injunction to restrain appellant from knowingly selling certain trade-

marked cosmetic and toilet articles manufactured by appellee, Max Factor & Co., and distributed by appellee, Sales Builders, Inc., at a price less than the resale price fixed by said appellees in certain contracts entered into between appellees and third persons. [Tr. of Record, pp. 1-21.] Appellant was not a party to such contract. [Tr. of Record, p. 10, par. XIV of Complaint.] Appellant raised the objection that Section 1½ of the Fair Trade Act was unconstitutional by filing a general demurrer to the complaint. [Tr. of Record, p. 21.] A hearing on said demurrer was had and the trial court thereupon made its order sustaining appellant's demurrer without leave to amend, on the ground that Section 1½ of the Fair Trade Act violated the 14th Amendment to the Constitution of the United States. [Tr. of Record, p. 22.] Judgment was entered on said order. [Tr. of Record, pp. 22-23.] Appellees appealed from said judgment, to the Supreme Court of the State of California and said court rendered its judgment reversing the judgment entered by the trial court on the order sustaining appellant's demurrer without leave to amend. [Tr. of Record, pp. 23-43.] Appellant's petition for a rehearing was denied, at which time the State Court modified its opinion by ordering the trial court to enter final judgment for the appellees by reason of appellant's election to stand upon his demurrer. [Tr. of Record, pp. 54-55.] The Supreme Court of the State of California, in reversing said judgment of the trial court, ruled that Section 1½ of the Fair Trade Act did not deprive the appellant of his liberty

or property without due process of law, in violation of the 14th Amendment of the Constitution of the United States.

Appellant appeals to this Honorable Court on the grounds that the conclusion reached by the Supreme Court is erroneous and that Section 1½ of the California Fair Trade Act is unconstitutional in that it deprives appellant of his liberty and property without due process of law.

The complaint, although an elaborate one, in substance alleges as follows [Tr. of Record, pp. 1-21):

That appellees are respectively the manufacturer and selling distributor of certain cosmetics and toilet articles, all of which bear trademarks registered in accordance with the laws of the United States of America; that appellant is the owner and operator of a retail drug store in the City of Beverly Hills, California; that subsequent to the effective date of the 1933 Amendment to the Fair Trade Act of the State of California, appellees adopted a system of doing business whereby appellee, Sales Builders, Inc., entered into certain contracts with its wholesale and jobbing distributors and with various retailers, by the terms of which said wholesalers and jobbers covenanted not to sell appellees' product to any retailers, save and except those who executed contracts with appellee, distributor, agreeing to sell said products at retail prices not less than those set forth in said contracts, and whereby said retailers agreed to sell said products at specified prices. It is then alleged that practically all of the wholesale and

retail druggists in California have executed such contracts, but that appellant, a retail druggist, declined to do so. Then follow allegations to the effect that appellant conceived and adopted a wrongful and unlawful plan to injure appellees, in that he purchased appellees' commodities from sources unknown to them and was selling certain of such commodities at prices lower than those established by appellee, Sales Builders, Inc., in its contracts with retailers. It is claimed that if appellant is permitted to continue, a large number, if not all of appellees' wholesale and retail contracts, may be cancelled by said wholesalers and retailers and that appellees' business will thereby be injured.

There is no allegation that appellant has maliciously, or otherwise, induced any wholesaler or retailer, with whom appellees have entered into contracts, to breach such contract, nor is it claimed that appellant has interfered with appellees' business in any manner other than by selling commodities manufactured and distributed by appellees at prices below those established by them in contracts to which appellant was not a party. It is not alleged that any contractual relationship, concerning the commodities sold by appellant, referred to in the complaint, has ever existed between appellant and appellees, or either of them. The complaint is thus framed solely upon the strength and authority of Section 1½ of the California Fair Trade Act, and unless said Amendment can be sustained as constitutional appellees' cause of action must necessarily fail.

B. The Statute Involved.

In 1931 the California legislature adopted an Act, commonly known as the "Fair Trade Act". (Stats. 1931, chapter 278, page 583, Act 8782 Deering's General Laws of California.) It reads as follows:

> "An act to protect trademark owners, distributors and the public against injurious and uneconomic practices in the distribution of Articles of standard quality under a distinguished trademark, brand or name.
>
> (Approved May 8, 1931, Stats. 1931, p. 583. In effect August 14, 1931.)
>
> 1. Certain sale contracts declared lawful.
> 2. Exception.
> 3. Definition.
> 4. Constitutionality.
> 5. Short title.
>
> "1. Certain Sale Contracts Declared Lawful.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of California by reason of any of the following provisions which may be contained in such contract:
>
> 1. That the buyer will not resell such commodity except at the price stipulated by the vendor.
>
> 2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

"2. Exception.—This act shall not apply to any contract or agreement, between producers or between wholesalers or between retailers as to sale or resale prices.

"3. Definitions.—The following terms, as used in this act, are hereby defined as follows:

'Producer' means grower, maker, baker, manufacturer or publisher.

'Commodity' means any subject of commerce.

"4. Constitutionality.—If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

"5. Short title.—This act may be known and cited as the 'Fair Trade Act'."

Prior to the adoption of this law, contracts for resale price maintenance were invalid in California under the Cartwright Act. (Calif. Stats. 1907, p. 984; Stats. 1909, p. 583, Deering's Gen. Laws, Act. 8702.)

The Fair Trade Act, therefore, constituted a radical departure from the traditional and accepted law respecting contracts, combinations and monopolies restraining trade, through price-fixing agreements. (Compare *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 55 L. ed. 502, 31 S. Ct. 376.) Its effect was to remove the commodities therein mentioned from the operation of the Cartwright Act, by permitting parties by voluntary contract to fix the resale price of such articles. Thus it restricted, where the Cartwright Act required, price competition as to the commodities referred to in the Act.

In 1933 the California legislature added a new section to said Fair Trade Act, being the provision whose constitutionality is here involved, designated as Section 1½ (Stats. of California, 1933, chapter 260, page 793), which provides as follows:

> "Sales Below Contract Price.—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

This Amendment purports to extend the operation of the original Fair Trade Act to all dealers who knowingly resell commodities with respect to which a resale price has been fixed by the manufacturer in any contract entered into under the original act. It does this irrespective of the fact that such dealers are not parties to, and have

never agreed to be bound by, the provisions of any such contracts.

In the present case appellant has entered into no contract with appellees respecting the commodities owned and sold by him. However, appellees, acting under the authority of said Section 1½ of the Fair Trade Act, seek to bind appellant by prices fixed by them in contracts to which he is not a party and to the provisions of which he has never assented. Appellant contends that when the California legislature thus attempted to subject appellant to the arbitrary will of appellees, with respect to the prices charged by him in the sale of his own property, it transcended the legitimate boundaries of legislative authority.

C. Importance of the Question.

Section 1½ of the Fair Trade Act poses the question of the authority of a private individual to restrict the right of another person with whom he has no contractual relation, to sell his own property at prices of his own choosing. Admittedly, such a statute is both novel and revolutionary. Although the California legislature was the first to enact such legislation, following its lead a number of other states have since adopted similar laws. (C. C. H.: Federal Trade Regulation Service, Vol. II (7th ed.), pp. 60,001-60,485.) Thus far, judicial authority in the state courts has divided almost equally upon the question of their constitutionality. Prior to the determination of the within cause by the California Supreme Court, both the New York Supreme Court and the New York

Court of Appeals had held unconstitutional an identical statute.

Coty, Inc. v. Hearn Department Stores, 158 Misc. 516, 284 N. Y. S. 909;

Doubleday, Doran & Co. v. Macy & Co., 158 Misc. 267, 284 N. Y. S. 533; Aff. 269 N. Y. 272, 199 N. E. 409.

Since the decision herein, the New York Court of Appeals has had occasion to reaffirm its decision.

Seecke & Kade, Inc. v. Tomshinsky (Memo. Decis.), 269 N. Y. 613, 200 N. E. 23.

In New Jersey a chancery decision has overthrown a similar statute.

Johnson & Johnson v. Weisbard, 120 N. J. Eq. 314, 184 At. 783.

On the other hand, the Supreme Court of Illinois has upheld the Illinois Fair Trade Act.

Triner Corp. v. McNeil, ... Ill. ....., 2 N. E. (2d) 929;

Seagram Distiller Corp. v. Old Dearborn Co., ... Ill. ....., 2 N. E. (2d) 940.

The clash of judicial opinion represented by these conflicting decisions was not entirely unexpected, as the subject of resale price maintenance has, for many years, been a prolific source of controversy among economists and legal students. There is set forth in the appendix a partial bibliography on the subject. While, for the most part, these authorities deal with the subject of resale price maintenance secured by private contract, the origin, nature, development and present status of the practice, as disclosed therein, may serve as a useful background for the present discussion.

D. Appellant's Assignment of Errors.

Appellant urges herein all of the errors set forth in his assignment of errors heretofore filed herein. [Tr. of Record, pp. 58-59.] They are as follows:

"1. That the Supreme Court of the State of California erred in reversing the judgment of the Superior Court of the State of California, entered on the order sustaining appellant's demurrer to appellees' complaint without leave to amend, and in thereby holding constitutional, Section 1½ of a statute of the State of California entitled 'An Act to Protect Trademark Owners, Distributors and the Public Against Injurious and Uneconomic Practices in the Distribution of Articles of Standard Quality Under a Distinguished Trademark, Brand or Name', which act is commonly known as the 'Fair Trade Act' (Stats. of California, 1931, Chapter 278, as amended by the addition of Section 1½ of said act, Stats. of California 1933, Chapter 260)."

"2. That the Supreme Court of the State of California erred in failing to render judgment in favor of appellant, affirming the judgment entered on the order of the trial court sustaining appellant's demurrer to appellees' complaint, without leave to amend."

"3. That the Supreme Court of the State of California erred in failing to hold that Section 1½ of said Fair Trade Act violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant of his property without due process of law."

"4. That the Supreme Court of the State of California erred in failing to hold that Section 1½ of said Fair Trade Act violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant of his liberty without due process of law."

E. Summary of Argument.

I.

Section 1½ of the California Fair Trade Act Is Unconstitutional in That It Authorizes Price Fixing as to Commodities Not Affected With a Public Interest.

(A) Section 1½ of the California Fair Trade Act Is a Price Fixing Statute.

Section 1½ of the California Fair Trade Act authorizes any manufacturer or distributor of the commodities therein referred to, by entering into a single contract prescribing its minimum resale price, to enforce such restriction on all wholesalers or retailers dealing in such commodity, having knowledge thereof, despite the fact that they are not parties to such contract. The act is not limited to trademarked, or even to well advertised commodities, but extends to all commodities which bear the trademark, brand or name of the producer or owner. Consequently, the act authorizes price fixing with respect to the almost unlimited number of articles which comprise consumers' goods.

(B) Section 1½ of the California Fair Trade Act Fixes Prices as to Commodities Which Are Not Affected With a Public Interest.

The right of an owner to fix the price at which his property may be sold is an inherent attribute of the property itself which is protected by the due process clause of

the Fourteenth Amendment. While in certain limited classes of businesses and commodities which have been held to be of paramount public concern, *i. e.*, affected with a public interest, price-fixing legislation has been upheld, the right to fix the prices for which ordinary commodities of trade and commerce are sold—in the present case, face powder, lipstick and rouge—has been consistently denied by the decisions of this court. Even in those rare instances where the right to fix prices has been recognized, the price fixing agency has always been either the legislature, or some state commission or other body; it has never been recognized that such power may be vested, as it is by the present statute, in private individuals.

(C) In Its Practical Operation the Statute Fixes Prices and It Is Immaterial That It Is Not Aimed Primarily at Price Fixing.

The fact, if it be a fact, that the Fair Trade Act is not aimed at price fixing, but seeks to regulate an allegedly unfair trade practice, does not render it immune from the application of the principles stated in "(B)" above. The substance of the law, its actual effect and the consequences of its operation, these are the criteria by which the law must be judged. Since in its actual functioning it operates to fix the price at which a merchant may sell his own property, it is indubitably a price fixing statute, regardless of any purpose or motive which may be ascribed to the legislature in bringing about its enactment.

(D) The Fact That the Legislation Affects an Entire Class of Articles Rather Than a Single Article Does Not Justify the Enactment.

The fact that the Fair Trade Act fixes prices as to an entire class of commodities rather than a single commodity cannot remove it from the ban of price fixing legislation. If anything, such characteristic, by which the law is made to apply to the tens of thousands of ordinary commodities which are the subjects of retail trade, renders the statute more obnoxious to the rule which prohibits such price fixing than if the statute were confined to a single commodity.

(E) The Decision in Nebbia vs. New York Has Not Overthrown the Doctrine That Price Fixing Is Allowable Only With Respect to Commodities Affected With a Public Interest.

Certain language in the recent decision of this court in *Nebbia v. New York* is strongly relied on in the decision of the State Supreme Court, as evidence of an abandonment by this court of the established distinction which exists between ordinary regulatory legislation enacted under the police power and legislation which seeks to fix the price at which goods may be bought and sold. Appellant submits that the *Nebbia* case does not have and was not intended to have, this effect. The facts in the *Nebbia* case differ so widely from those involved herein as to make it entirely inapplicable to the present case. Properly viewed, that decision is entirely in harmony with the doctrine which confines price fixing legislation to businesses affected with a public interest, as laid down in a long line of decisions of this court.

II.

Section 1½ of the California Fair Trade Act Is Not a Permissible Exercise of the State Police Power.

(A) The Act Deprives Appellant of Valuable Constitutional Rights of Liberty and Property.

The Fair Trade Act not only prevents appellant from disposing of property owned by him and acquired without knowledge of any price restrictions imposed by the manufacturer, for such prices as he desires, but also prevents him from freely contracting for the acquisition of property free from any restrictions as to its resale price. Thus the act deprives appellant of both liberty and property rights.

(B) Section 1½ of the Fair Trade Act Does Not Bear a Reasonable Relation to a Proper Legislative Purpose.

1. *It Is Not Confined in Its Scope and Operation to the Alleged Evil of Predatory or Unfair Price Cutting.*

Even though it be viewed, not as price fixing legislation but as a law enacted under the state police power, the act is unconstitutional in that it is not confined to the evil which it seeks to prohibit. If there is any evil which may be claimed to exist in price cutting of standard brand merchandise, it obviously does not extend to *all* price competition as to such commodities, but only to certain forms of price competition, such as injurious forms of "loss leader" advertising, malicious price cutting, etc. It is common knowledge, however, that there are many instances of price competition which are not of such character. More efficient business methods, merchandis-

ing economies, advantages in location, etc., may enable a merchant, without engaging in any practice which may be described as unfair, to sell commodities at a lower price than his competitor and still make the same, or even a greater profit. Regardless of the legislature's authority under the police power to prohibit price cutting in certain of its extreme or injurious forms, clearly it has no power under the constitution to prohibit, as does the present act, *all price competition* irrespective of its nature.

2. *The Unreasonable Scope of the Law Is Not Justified by Any Alleged Difficulty Which May Be Claimed to Exist, in Devising or Enforcing a Proper Statute.*

The statute is not justified by any alleged difficulty which may be claimed to exist, in devising legislation which is appropriately limited to the real evil sought to be remedied. Such difficulty is not ground for suppressing such evils by arbitrary and unreasonable methods which are precluded by the constitution. The problem of effectively dealing with claimed evils existing in certain forms of price cutting is one for legislative ingenuity to solve, and it is not permissible for the legislature to avoid this responsibility by the crude device of prohibiting all price competition.

3. *The Fact That the Law Prohibits Ordinary, Legitimate, Price Competition Cannot Be Justified by Any Alleged Injury Which May Be Claimed to Result From Such Competition.*

Any attempt to prohibit price competition which is innocent, honest, fair and free from any recognized specie of commercial overreaching, which, in brief, is consistent with the accepted norms of business ethics as practiced

act to enforce against him. A conspicuous instance of this arbitrary operation of the act is found in the fact that under it a retailer may be prevented by a competitor from selling an item at the very price fixed in his own contract with the manufacturer. Again, since the enforcement of the act is in the hands of private individuals, certain retailers who violate the act may be punished while more favored merchants may be permitted to cut prices with impunity. Also, the failure of the act to provide any means by which retailers may ascertain the validity of the price fixing contracts to which they are required to conform, or for notice of the making of any downward price changes therein, keeps appellant constantly in the dark as to the prices which he may charge. Such power of arbitrary and discriminatory application which the statute places in the hands of private persons, violates the first principles of due process of law.

III.

The Statute Is Ambiguous, Indefinite and Unintelligible and for These Reasons Void.

The right conferred by the Fair Trade Act to control resale prices is limited to those commodities which are "in fair and open competition with commodities of the same general class produced by others". These conditions are, therefore, the standards which mark and define the limits of permissible price competition under the statute. Proof of their existence in a given case constitutes a condition precedent to a recovery therein.

Appellant contends that the expressions "fair and open competition" and "general class" have no established meaning at common law. The definition of "fair competition" at common law implies the absence of certain well recognized unfair trade practices on the part of individuals. The term "fair and open competition", as used in the act, is not only broader in scope, but relates, not to the conduct of any given individual, but to some quality of the commodity itself as it passes through the hands of thousands of wholesalers and retailers, the acts of any one of whom may constitute the commodity, *pro tanto* at least, in unfair competition with other commodities. Under these circumstances it would be utterly impossible for a merchant, even if he could attach an intelligible meaning to the expression "fair and open competition with commodities of the same general class" to determine whether such condition existed at any particular time, with respect to a given commodity. The term "general class" is, of course, utterly devoid of definite meaning. Since neither of these terms is given any definition by the act, since they have no special meaning known to the parties required to use them, since they have no known meaning at common law, and since, even if they had a definite meaning, the task of applying such a test would be beyond the ability of the average retailer, they must be rejected as being too uncertain, indefinite and ambiguous to constitute proper statutory standards. Without them the act itself becomes crippled beyond recognition and must, therefore, be stduck down.

ARGUMENT.

I.

Section 1½ of the California Fair Trade Act Is Unconstitutional in That It Authorizes Price Fixing as to Commodities Not Affected With a Public Interest.

(A) Section 1½ of the California Fair Trade Act Is a Price Fixing Statute.

Section 1½ of the California Fair Trade Act authorizes any maufacturer or distributor of the commodities therein referred to, by the simple expedient of entering into a contract prescribing its minimum resale price, to enforce such restriction on all persons having knowledge thereof. Any departure from the price set forth in such contract, knowingly made, constitutes a statutory tort of unfair competition. Thus the effect of the statute is to authorize price fixing at the mere edict of private individuals, with reference to a wide field of commodities. In fact, not being limited to trademarked goods, but, extending as it does, to any commodity which bears, or the label or content of which bears, the "trademark, brand, or name of the producer or owner", the statute necessarily includes within its scope almost the entire sphere of consumers' goods. It is common knowledge today that nearly all articles sold to the public, with the possible exception of some bulk goods, either bear the trademark or brand of the producer, or, at the very least, there may be found somewhere upon them or upon the container or package in which they are sold, the *name* of the manufacturer. By the explicit language of the statute, the latter is sufficient to bring the commodity within the provisions of the

act. Thus the statute is all-embracing, authorizing and inviting price fixing throughout the entire field of retail trade. Since it imposes such fixed prices on non-contracting third parties, regardless of their own volition, it is essentially and intrinsically a price fixing law.

(B) SECTION 1½ OF THE CALIFORNIA FAIR TRADE LAW FIXES PRICES AS TO COMMODITIES WHICH ARE NOT AFFECTED WITH A PUBLIC INTEREST.

It would appear to be a work of supererogation for appellant to elaborately argue before this Honorable Court, the oft stated, and by this time firmly established, proposition, that price fixing legislation of the character here involved, is valid only when it deals with a business which is devoted to a public use, or concerns commodities which have arisen to such high public importance, or become of such deep public concern, that it can properly be said of them that they have become "affected with a public interest". The origin, development, scope and application of the rule may be traced through the following decisions:

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77;

Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 12 S. Ct. 468;

German Alliance Insurance Co. v. Kansas, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612;

Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865, 41 S. Ct. 458, 16 A. L. R. 165;

Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A. L. R. 1280;

Tyson v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A. L. R. 1236;

Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913, 48 S. Ct. 545, 56 A. L. R. 1327;

Williams v. Standard Oil Company, 278 U. S. 235, 73 L. ed. 289, 49 S. Ct. 115, 60 A. L. R. 596;

New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371;

Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469.

Rather than burden this court with lengthy quotations from the above decisions, it will be enough, we think, to set forth the following propositions for which they stand.

1. The right of an owner to fix a price at which his property may be sold is an inherent attribute of the property itself, forming one of the highest incidents of its ownership. For this reason, interference with this right is not justified by circumstances which would permit other forms of police regulation.

Tyson v. Banton, supra;

Ribnik v. McBride, supra.

2. The significant requirement to establish that a business is affected with a public interest is that it must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public.

Tyson v. Banton, supra;

Ribnik v. McBride, supra.

3. The common callings are in no sense devoted to a public use and the sale of ordinary commodities of food, clothing and the like are not affected with a public inter-

est so as to warrant the fixing of the prices which may be charged therefor.

Wolff Packing Co. v. Court of Industrial Relations, supra;

Williams v. Standard Oil Co., supra;

New State Ice Co. v. Liebmann, supra.

4. Subject to regulation in the prices they may charge the public as being a business devoted to a public use, or as related to commodities "affected with a public interest", are grain elevators (*Munn v. Illinois, supra*), insurance (*German Alliance Insurance Co. v. Kansas, supra*), housing as a wartime emergency measure (*Block v. Hirsh, supra*), and the sale of milk as a temporary emergency (*Nebbia v. New York, supra*). On the other hand, the fixing of prices in numerous basic industries, such as food, clothing, transportation, etc., in order to secure continuity in such industries (*Wolff Packing Co. v. Court of Industrial Relations, supra*), the sale of theatre tickets (*Tyson v. Banton, supra*), gasoline (*Williams v. Standard Oil Co., supra*), and ice (*New State Ice Co.* v. *Liebmann, supra*), are not so vital to the public welfare as to warrant price fixing in such businesses.

5. The mere fact that the legislature declares a business to be affected with a public interest is not determinative of the issue. The matter is always open to judicial inquiry.

Wolff Packing Co. v. Court of Industrial Relations, supra;

Tyson v. Banton, supra.

(Note that in the present case there is no such legislative declaration.)

6. While there is no closed category of businesses which are, or may be, clothed with a public interest, (*Nebbia v. New York, supra,* 291 U. S. at p. 536), nevertheless, any business sought to be controlled in respect to the prices which may be charged, must fall into one of three categories. These are defined in *Wolff Packing Co. v. Court of Industrial Relations, supra,* as follows: (262 U. S. at p. 535)

> "(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.
>
> "(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of keepers of inns, cabs and gristmills. State v. Edwards, 86 Me. 102; Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, 254.
>
> "(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."

Further discussion of the rule is unnecessary. Palpably, the almost unlimited field of commodities to which the Fair Trade Act applies, are not within any of the catagories above set forth and in no sense constitute commodities which are affected with a public interest. To say that all commodities which bear the trademark, brand or name of the producer or owner may be subject to price fixing in the manner permitted by the present legislation, is to say that the price of everything, from a safety pin to a steam yacht, may be fixed by the legislature. This, as was said in *Wolff Packing Co. v. Court of Industrial Relations, supra* (262 U. S. at p. 539), would be

> "running the public interest argument into the ground."

If food and clothing (*Wolff Packing Co. v. Court of Industrial Relations, supra*), gasoline (*Williams v. Standard Oil Co., supra*), theatre tickets (*Tyson v. Banton, supra*), and ice (*New State Ice Company v. Liebmann, supra*), are not of such vital public concern as to constitute them affected with a public interest, *a fortiori* the commodities involved in the instant case, i. e., face powder, rouge and lipstick [Tr. of Record, p. 13], are not of such grave public concern as to bring them within the class of commodities affected with a public interest. Equally self-evident is it, that appellant's business, that of a retail druggist, is not of such high public importance as to stamp it as one devoted to a public use. It must be pointed out here, that in all cases in which price fixing has received judicial sanction, the prices were fixed by the state itself or by some governmental agency exercising the legislative power of the state. In the instant case, the prices to which a non-contracting retailer is required

to submit are imposed, not by a state agency, but by the *ipse dixit* of private individuals.

The mere statement of the foregoing propositions should suffice to establish the Act's invalidity. Appellant, therefore, refrains from further laboring the point.

The majority opinion of the state court in the within cause, attempts to extricate the present case from the force of appellant's contention, by means of the following arguments: (1) that the statute does not aim primarily at regulating prices but at protecting the property and contract rights of manufacturers; (2) that assuming that it does fix prices, it escapes criticism because it regulates an entire class of articles rather than a single article; and (3) that by its recent decision in the *Nebbia* case, this court has abandoned the long established principle which requires as a prerequisite for permissible price fixing, that a business must be of fundamental public concern and has adopted, instead, the rule that if the articles involved are subject, at all, to regulation under the police power, then their purchase and sale does affect the public interest so as to warrant the fixing of prices therein. We shall consider briefly these contentions:

(C) In Its Practical Operation, the Statute Fixes Prices, and It Is Immaterial That It Is Not Aimed Primarily at Price Fixing.

The fact, if it be a fact, that Section 1½ of the Fair Trade Act is not aimed at fixing prices but has as its alleged purpose the regulation of certain allegedly unfair trade practices, obviously does not save the statute from constitutional objection if, in fact, it is a price fixing enactment. To hold otherwise would be to substitute the motives of the legislature, for the practical consequences

of the legislation. If it be assumed that the regulation of prices was not the main purpose of this legislation but rather the protection of the good will of a producer or a manufacturer, it does not follow that such protection may be achieved in a manner contrary to the constitutional rights of a citizen to freely deal with his property.

Wolff Packing Co. v. Court of Industrial Relations, supra;

Tyson v. Banton, supra;

Williams v. Standard Oil Company, supra.

If the normal operation of the act involves the fixing of prices, it is manifestly a price fixing statute and its validity must be judged entirely by the constitutional cannons applicable to this type of legislation. Thus in *Tyson v. Banton, supra,* the object of the act involved, was not to fix prices, but to safeguard the public against fraud, extortion, exhorbitant rates and similar abuses in the sale of theatre tickets. Again, the avowed object of the act involved in *Wolff Packing Co. v. Court of Industrial Relations, supra,* was not to fix wages, but to secure continuity of food, clothing and fuel supply in the state. Yet in both of these cases and in numerous others of similar import which might be cited, it was held that irrespective of the *purpose* or *object* of the act involved, if, in fact, it operated to fix or control prices in a business not affected with a public interest, it was invalid. Similarly here, the fact that in actual operation the statute authorizes strangers to fix the price at which appellant may sell his own property and is therefore price fixing legislation, is not dissolved by the alchemy of a different legislative intent, but remains an insuperable bar to its validity.

(D) THE FACT THAT THE LEGISLATION AFFECTS AN ENTIRE CLASS OF ARTICLES RATHER THAN A SINGLE ARTICLE DOES NOT JUSTIFY THE ENACTMENT.

In attempting to surmount the rule which requires that before prices may be regulated, a business must be of the utmost public concern, i. e., "affected with a public interest", the majority opinion of the state court recites (91 Cal. Dec. at p. 355):

> "It may be that when the Legislature attempts to regulate the price of a particular commodity, in order to justify classifying that article differently from other commodities, its purchase and sale must affect the public interest. But here the legislation affects an entire class of articles, which class, as will later appear, is reasonably the subject of classification."

Appellant contends that the fact that the Fair Trade Act deals not with a single commodity but with an entire class of commodities, does not militate against the established rules of law which prohibit price fixing in a business not affected with a public interest. If anything, the rule is contrary; courts display greater reluctance to permit price fixing in a case involving a class of goods or businesses, rather than a single one. Thus the right to fix prices has been recognized in the case of a single business which, because of a public emergency, was found to be affected with a public interest, and has been denied in an instance involving an entire class of businesses where the requirement of imminent public concern was absent.

Compare:

Nebbia v. New York, supra;

Wolff Packing Co. v. Court of Industrial Relations, supra.

Clearly the objection that the commodities here involved are not "affected with a public interest", cannot be hurdled by the assertion that the present case deals with an entire class of goods rather than a single one. In either situation there must appear the grave public concern which has always been held to be a necessary prerequisite to the validity of this type of regulation and which is totally absent in the class of commodities to which the Fair Trade Act applies.

(E) The Decision in Nebbia v. New York Has Not Overthrown the Doctrine That Price Fixing Is Allowable Only With Respect to Commodities Afected With a Public Interest.

In support of its interpretation of the decision in the *Nebbia* case, as constituting a complete about face by this court in its view point toward price fixing legislation, the state court quotes the following excerpt from the *Nebbia* case (91 Cal. Dec. at pp. 355, 356):

> " 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. Thus understood, "affected with a public interest" is the equivalent of "subject to the exercise of the police power"; and it is plain that nothing more was intended by the expression.' "
>
> *Nebbia v. New York,* 291 U. S. at p. 533.

It will be conceded, we think, that prior to the appearance of the above language, the entire tenor of judicial opinion repudiated the view that the doctrine of "affected

with a public interest" was the exact equivalent of "police power".

Munn v. Illinois, supra;

Wolff Packing Co. v. Court of Industrial Relations, supra;

Ribnik v. McBride, supra;

Tyson v. Banton, supra.

Although the language above quoted when completely isolated and removed from the factual situation in connection with which it was used, might be contended to support the conclusion reached by the state court upon this point, appellant is of the view that it was not intended to have this result. On the contrary, appellant submits that the language quoted must be interpreted in the light of the facts and of the historical background present in that case, which warranted the conclusion that the milk industry of New York was of sufficient public concern to constitute it a business "affected with a public interest" and warrant price fixing as a *temporary* measure. This court has already remarked that the New York Milk Control Act was "a temporary expedient".

Borden's Farm Products Co., Inc. v. Ten Eyck, ... U. S. ....., 80 L. ed. 469, 56 Sup. Ct. Rep. 453.

The distinctions between the facts present in the *Nebbia* case and the circumstances of the within case are marked and numerous. There, the subject of regulation, the milk industry, dealt with a staple and essential element of diet, involving a matter of public health (291 U. S. at pp. 516, 517); the industry itself was a paramount one in the

state and was closely bound up with its economic and financial life (291 U. S. at p. 517); the industry had been subjected to legislation of every character for many years (291 U. S. at pp. 521, 522); the act was effective only for a limited time and the court found that a great economic emergency existed (291 U. S. at pp. 515, 516, 517, 518 and footnote at pp. 518, 519); the act contained detailed findings of fact as to the grave domestic conditions which warranted the particular legislation (291 U. S., footnote at pp. 518, 519); the prices were fixed by an administrative board whose decisions were subject to judicial review (291 U. S., footnote at p. 520).

In the present case the subject of regulation does not involve public health; it is not a paramount one in the state; it is in nowise bound up in its financial or economic life; the commodities have never before been subject to any extensive regulation; the act contains no detailed, or any, findings of fact as to the conditions which warrant the legislation; the act is not temporary but permanent in character, and the prices are fixed, not by an administrative board with provision for judicial review but by the arbitrary edict of private individuals whose decisions are final. It would be hard, indeed, to find two decisions more dissimilar in their facts.

It is well to recall here the warning which was sounded by this court in *Tyson v. Banton, supra*, against invoking the abstract language contained in one decision as authority for another case involving different facts. In re-

ferring to its decision in *German Alliance Insurance Co. v. Lewis,* 233 U. S. 389, 58 L. ed. 1011, 34 Sup. Ct. Rep. 612, which decided that insurance companies were "affected with a public interest", the court quoted the following language from that case (273 U. S. at p. 436):

> "'And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become "clothed with a public interest," and therefore subject "to be controlled by the public for the common good."'"

The court then added (273 U. S. at p. 473):

> "This observation fairly may be regarded as a warning at least to be cautious about invoking the decision as a precedent for the determination of cases involving other kinds of business."

Moreover, since its decision in the *Nebbia* case, this court in *Morehead v. Tipaldo,* ..... U. S. ....., 80 L. ed. 921, 56 S. Ct. 918, has cited with approval several of its outstanding decisions upholding the doctrine of "business affected with a public interest".

Appellant, therefore, does not view the *Nebbia* case in the revolutionary light in which it is pictured by the California Supreme Court, but rather as a single additional instance, circumscribed by its own unique facts, to be added to those cases already recognized, wherein, by the judicial process of exclusion and inclusion, the concept of business affected with a public interest is being gradually defined and developed.

Appellant is aware that the doctrine of a "business affected with a public interest" has not gone without criticism.

> Dissenting Opinions of Stone, J. and Holmes, J. in *Tyson v. Banton, supra* (273 U. S. at p. 447) and of Holmes, J., Brandies, J. and Stone, J. in *Ribnik v. McBride, supra* (277 U. S. at p. 359);
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> 39 *Yale Law Journal,* No. 8 (June, 1930), at p. 1089.

That it offers, at best, an indefinite standard for determining those businesses in which price fixing is permitted, has been recognized by this court. But such recognition has been made in decisions which have uniformly used it as a criterion.

> *Tyson v. Banton, supra;*
>
> *Wolff Packing Co. v. Court of Industrial Relations, supra;*
>
> *Ribnik v. McBride, supra.*

As stated in the last mentioned case (277 U. S. at p. 355):

> "As was recently pointed out in Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 430, the phrase is not capable of exact definition; *but, nevertheless, under all of the decisions of this court from Munn v. Illinois 94 U. S. 113, it is the standard by which the validity of price-fixing legislation, in respect of a business like that here under consideration, must be tested.*" (Italics added.)

In conclusion on this branch of the case, appellant submits that while, as said in the *Nebbia* case, there is nothing sacrosanct about price fixing which entirely removes it from the sphere of legislative action, and while under appropriate conditions the legislature may regulate a business by fixing prices, as well as in other respects, nevertheless the historical distinction between these two types of legislative control has not been destroyed by the *Nebbia* case, and the quoted language from that decision was not intended to, and cannot, be lifted bodily out of the factual context in connection with which it was used and placed in juxtaposition with the entirely different factual situation existing in the present case as constituting a precedent for the validity of the statute; that the law is, today, as it has always been, that before legislative interference with the price a man may charge for his property can be justified, extraordinary circumstances must exist which create a uniquely intimate relation between that business and a public interest which is of a paramount concern to the state.

Since the facts of the present case are similar to those involved in *Wolff Packing Co. v. Court of Industrial Relations, supra, Tyson v. Banton, supra,* and *Williams v. Standard Oil Company, supra,* and are clearly dissimilar from those involved in the *Nebbia* case, it is governed by the former decisions and not the latter, and, so governed, the conclusion becomes inescapable, that the present legislation attempts to fix prices with respect to commodities which are not affected with a public interest and, therefore, violates the due process provisions of the 14th Amendment.

II.

Section 1½ of the California Fair Trade Act Is Not a Permissible Exercise of the State Police Power.

(A) The Act Deprives Appellant of Valuable Constitutional Rights of Liberty and Property.

The Fair Trade Act not only prevents appellant from disposing of property owned by him and acquired without knowledge of any price restrictions imposed by the manufacturer, for such price as he desires, but also prevents him from freely contracting for the acquisition of property free from any restrictions as to its resale price. Thus the act deprives appellant of both liberty and property rights. As to property acquired by appellant before notice of the resale price was given, any subsequently imposed restrictions on the *jus disponendi* is violative of appellant's property rights. The right of appellant to fix the price at which he may sell his property is protected by the due process of law provisions of the 14th Amendment. As stated in *Tyson v. Banton, supra* (273 U. S. at p. 429):

> "* * * The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself (Case of the State Freight Tax, 15 Wall, 232, 278, 21 L. ed. 146, 162) and, as such, within the protection of the due process of law clauses of the Fifth and Fourteenth Amendments."

And the right of unrestricted alienation is one of the essential incidents of a right of general property in movables.

> *Dr. Miles Medical Co. v. John D. Parke & Sons,* 220 U. S. 373, 55 L. ed. 502, 31 S. Ct. 376.

But no less entitled to protection is appellant's liberty of contract which includes his right to acquire property upon such terms and free from such restrictions as he may agree with the seller.

Algeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 S. Ct. 427;

Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277;

Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A. L. R. 1446;

Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893, 47 S. Ct. 506, 52 A. L. R. 163;

Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 735, 43 S. Ct. 394, 24 A. L. R. 1238;

Morehead v. Tipaldo, ... U. S. ....., 80 L. ed. 921, 56 S. Ct. 918.

The statute here involved deprives appellant of both of these rights and, in addition, *ex proprio vigore* compels him, willingly or not, to be a party to a price fixing contract made between third parties. Thus there can be no question but that the statute deprives appellant of valuable constitutional rights.

Viewed as price fixing legislation, as appellant submits it must be viewed, it has already been pointed out herein that the requisite conditions for sustaining the statute are totally absent from the case. Assuming that it is to be considered, not as price fixing legislation but rather as an attempt, pursuant to the state police power, to regulate an allegedly unfair trade practice, which was the view taken by the state court, it still falls far short of meeting the requirements of such legislation.

To sustain the statute on this ground it must appear that the law bears a real and substantial relation to a proper legislative purpose, i. e., there must appear a clear connection between the assumed purposes of the act, viz.: the public health, morals, safety or general welfare, and the actual provisions thereof. In addition, it must not be arbitrary or discriminatory in nature. These essentials are well stated in *Nebbia v. New York, supra* (291 U. S. at p. 537), as follows:

> "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio.*"

To the same effect are numerous decisions of this court.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499;

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539;

Nectow v. City of Cambridge, 277 U. S. 183, 72 L. ed. 842, 48 S. Ct. 447;

Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A. L. R. 1446;

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431;

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18;

Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 74 L. ed. 204, 49 S. Ct. 57.

Appellant will demonstrate herein that the Fair Trade Act utterly fails to meet these requirements and that, therefore, it is not a permissible exercise of the state police power.

(B) SECTION 1½ OF THE FAIR TRADE LAW DOES NOT BEAR A REASONABLE RELATION TO A PROPER LEGISLATIVE PURPOSE.

1. *It Is Not Confined in Its Scope and Operation to the Alleged Evil of Predatory or Unfair Price Cutting.*

The title of the Fair Trade Act states its purpose as follows:

> "An Act to protect trademark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name."

The body of the act is much broader in scope and in effect prohibits *all price competition* as to any commodity which bears, or the label or content of which bears, the trademark, brand or name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others.

However, a reference to the complaint herein, as well as to the general literature on the subject, discloses, that if there is any evil in retail price competition with respect to the type of commodities above referred to, it does not inhere in price competition *per se*. Rather, it is certain forms of price cutting, i. e., destructive, unfair or "predatory" price cutting, or the use or abuse of so-called "leader" advertising or "loss leaders" which, it has been contended, has injurious consequences. [Tr. of Record, p. 7, Paragraph XII of Complaint.]

> Report of Federal Trade Commission on Resale Price Maintenance, Part II, pp. 4, 9 and 165;
>
> Federal Trade Commission: Report on Chain Store Leaders and Loss Leaders, Senate Document No. 51, 72nd Congress, 1st Session;

Haring: Retail Price Cutting (1935) pp. 4-5, pp. 191-192;

Seligman & Love: Resale Price Maintenance (1932) at pp. 268-269; 342;

Tosdal: Price Maintenance, Vol. 3, American Economic Review (1918) at p. 30;

National Industrial Conference Board: Public Regulation of Competitive Practices (1929) at pp. 91-92; 96-97;

46 Harvard Law Review, (May 1933) 1195;

5 Fordham Law Review, No. 1 (Jan., 1936) p. 50;

36 Columbia Law Review, No. 2 (Feb., 1936), pp. 293, 294.

These are matters of general business knowledge of which this court may take judicial knowledge.

Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324;

New Jersey Asbestos Company v. Federal Trade Commission (C. C. A.), 264 Fed. 509, 18 A. L. R. 546.

Without attempting to determine to what extent these objectives are proper matters for legislative control, it is enough to assume for the moment, that certain forms of price cutting on standard brand merchandise may be curbed by statute. However, it is equally clear that any and all price competition, or price competition *per se,* even though confined to the class of commodities referred to in the present act, is not harmful to the public welfare. Consequently, any legislation which, though aimed at the former, actually accomplishes the latter, is beyond the

purview of legislative control. A state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable or unnecessary restrictions upon them.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499;

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539;

Louis K. Liggett & Co. v. Baldridge, 278 U. S. 105, 73 L. ed. 204, 49 S. Ct. 57;

Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A. L. R. 1446;

Burns Baking Co. v. Bryan, 264 U. S. 504, 68 L. ed. 813, 44 S. Ct. 412, 32 A. L. R. 661;

Washington v. Roberge, 278 U. S. 116, 73 L. ed. 210, 49 S. Ct. 50;

Weaver v. Palmer Bros. Co., 270 U. S. 402, 70 L. ed. 654, 46 S. Ct. 320.

It is the duty of the court to determine whether the challenged provisions have a real and substantial relation to a proper legislative purpose.

Meyer v. Nebraska, supra;

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169;

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679;

Lawton v. Steele, supra;

Lochner v. New York, supra;

Nebbia v. New York, supra.

And while the general wisdom of the law is not before the court, the determination of such limits of permissible restriction is essentially a judicial question.

Dobbins v. Los Angeles, supra;
Connolly v. Union Sewer Pipe Co., supra;
Lochner v. New York, supra.

The restriction of rights to an extent greater than is required by any perceptible end is violative of the above rules.

Nectow v. City of Cambridge, 277 U. S. 183; 72 L. ed. 842, 48 S. Ct. 447;

Schlesinger v. Wisconsin, 270 U. S. 230, 70 L. ed. 557, 46 S. Ct. 260;

Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893, 47 S. Ct. 506;

Tyson v. Banton, supra;

Louis K. Liggett Co. v. Baldridge, supra;

Weaver v. Palmer Bros. Co., 270 U. S. 402, 70 L. ed. 654, 46 S. Ct. 320;

Varney & Green v. Williams, 155 Cal. 318, 100 Pac. 867.

An iniquitous feature of the statute here involved, indeed, perhaps its most egregious fault, is that it totally ignores the limits of permissible police regulation laid down in the above decisions. As to any manufacturer of the commodities referred to in the act who desires to take advantage of its provisions, it declares *all price competition as to his product unfair competition.* It

blandly asserts that the mere fact that one retailer sells such an article for less than his competitor, *ipso facto* is unfair competition. It is not concerned with the particular *kind* of price competition that exists in any individual case. The existence or non-existence of a malicious intent to injure competition; the existence of real as distinguished from simulated competition; the use of leaders, loss leaders or sales below cost; the fraudulent "switching" of brands in connection with "loss leader" advertising; whether the price competition is temporary and predatory in nature or whether it is permanent and legitimate; with all these factors it concerns itself not. They are, indeed, entirely irrelevant and immaterial to making out a case under the statute. This is done by merely proving that a sale of a commodity has been knowingly made at less than the resale price fixed by the manufacturer in any contract with a third person.

This mere statement of the scope of the act should be sufficient to impel the conclusion that it utterly fails to meet the requisites for its validity as above laid down, in that it imposes restriction on personal and property rights in the sale of commodities, which can have no conceivable relation to any recognized commercial evil. The act states, in effect, that all price competition is unfair competition and, therefore, unlawful. Common knowledge tells us otherwise. Lower rental, more competent employees, more efficient management, purchases with cash discounts, close proximity to buying and manufacturing centers, aggressive advertising, skillful utilization of

display space—these, and a host of other elements, may enable a retailer to sell his goods at a uniform reduced price and still make a reasonable profit. A striking example of this practice is cited in Professor Haring's recent work, "Retail Price Cutting". (pp. 13-14):

> "There is in the city of New York one department store, R. H. Macy and Company, especially noted for its price cutting. In justification of this practice, the store asserts that it conducts its business more efficiently than the majority of its competitors, that it has developed and does exercise economies which other stores lack. For example: (1) It gives to customers no credit accommodations. Every sale is a sale for cash. Hence no losses are suffered through bad debts, idle book capital, and the expense of large accounting and collecting departments. (2) In the variety and quality of goods, and in their display, it believes it has another advantage. (3) Its salesclerks are of a high order of ability: they obtain an unusually high percentage of possible sales and make for satisfied customers and a very small proportion of returned goods. (4) It buys goods in large quantities, and pays cash, thus securing the benefits of both cash and quantity discounts. Many of its goods are bought directly from the factory. The prices for goods do not include any middlemen's profits. (5) It advertises wisely and on a large scale, and has developed a volume of business which in proportion to the capital employed is far greater than the average. Such rapidity of turnover can easily bear heavy price cutting. For even though the margin of profit on each turnover be small, a sufficient number of turnovers will in the long run guarantee large profits."

The author continues:

"Chain stores not only lay claim to these same economies, but, in addition, many make no deliveries. Some, indeed, go so far as to compel the customer to do his own selecting of goods and are known as 'self-service' stores."

"In the large retailing organizations, there are apparent the beginning of a scientific system of training men for managerial positions of all grades. These new courses include instruction in modern merchandising, sales management, advertising, display of goods, and sales psychology. Management efficiency may therefore be expected to increase in the future with attendant lowered costs."

"There are many stores in existence which claim the advantage of low rents, and low wage expenditures. Still others enjoy close proximity to buying and manufacturing centers, and hence save on transportation charges."

"Such instances could be multiplied indefinitely. Those given are sufficient, however, to make clear that *many stores do exist which through peculiarly advantageous economies enjoyed by them are able to sell their goods—not one item, nor yet only a few goods of the standard trade-marked variety, but all their goods—at a uniform cut price, and yet derive reasonable profits. In such cases there is undoubtedly a sound economic justification for price cutting.*" (Italics added.)

Thus, by the judicious buying of goods and selection of stock, by skillful window display, by attractive advertising, by wise pricing of his goods, by honesty and reliability in his dealings with the public, by advantage in location and rental, by prudence in giving credit accom-

modations, by the employment of well trained efficient salesmen, and other similar economies, a druggist may be able to reduce his cost of business to a point possibly ten per cent below the cost of the average druggist. As a result, he may be able to sell, not only Max Factor face powder, but all of his goods, at a lesser price than his competitor and still make as great a profit. Rather than pocketing the extra profit he may prefer to build up a good will by sharing these merchandising economies with his customers through reduced prices. The Fair Trade Act prohibits him from exercising this right.

Again it is generally recognized that there is a wide difference in the cost of doing business among retailers, depending upon the type of service rendered, *i. e.*, whether cash and carry or delivery, credit, etc.; types of organization, *i. e.*, whether mail order, chain store, department store, specialty shop, etc., and also among retailers of different types handling the same merchandise.

Report of Federal Trade Commission on Resale Price Maintenance, Part II, pp. 2-3, 4-5 and 84-122;

15th Census of the United States: Distribution, Vol. 1, pp. 21-25;

Haring: Retail Price Cutting (1935), pp. 18-20; 36; 41;

Seligman & Love: Resale Price Maintenance, pp. 341-342;

National Industrial Conf. Board: Public Regulation of Competitive Practices (1929), at pp. 94-95;

Stevens: Resale Price Maintenance as Unfair Competition: 19 Col. Law Review, No. 4, pp. 265, 269 (June, 1919).

As stated by Professor Haring (p. 41):

> "Costs of doing retail and wholesale business differ between types of outlets (grocery and drug stores), between types of stores in the same general classification (chain and independent grocery stores), and between individual stores (efficient and inefficient independent grocery stores). The manufacturer, therefore, must expect his trade-marked merchandise to be sold to consumers at differing prices if he has complete distribution. This will be the case if each and every retail outlet sets a price upon the product which covers costs and allows a reasonable profit."
>
> "To have an identical price charged by every retailer handling the article, a manufacturer would, theoretically, have to limit his outlets to, for example, chain grocery stores of high efficiency, or to independent grocery stores of approximately equal efficiency. Practically, the situation is not so acute, yet *a manufacturer cannot reasonably expect a diversified group of dealers to charge identical prices even though none of them indulge in predatory price cutting.*" (Italics added.)

It is needless to say that all of the foregoing represent common economic, commercial and business conditions of which this court may take judicial notice.

Muller v. Oregon, supra.

In all of the above cases a retailer may reduce prices on standard brand commodities, not in the form of "loss leaders", not by selling his merchandise below cost, not by the deliberate slashing of prices with the intent to injure his competitor or damage the good will of the manufacturer, not by the fraudulent "switching" of

brands, not by any recognized species of commercial overreaching, but from honest, legitimate, forthright effort. Does the legislature have the power to deprive him of this right? The Fair Trade Law, by failing to discriminate between justifiable and unjustifiable price cutting, by failing to restrict its scope and application to cases in which any recognized evil of unfair dealing could be claimed to exist, says that it does. Numerous decisions of this court categorically deny this contention.

Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893, 47 S. Ct. 506;

Tyson v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426;

Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 37 S. Ct. 662;

Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913, 48 S. Ct. 545, 56 A. L. R. 1327.

In *Fairmont Creamery Co. v. Minnesota, supra,* there was involved the validity of a statute which prohibited the purchase of commodities at a higher price in one part of the state than in another. The act was overthrown as extending its scope to cases not properly subject to restriction, the court stating (274 U. S. at pp. 8, 9):

> "It seems plain enough that the real evil supposed to threaten the cream business was payment of excessive prices by powerful buyers for the purpose of destroying competition. To prevent this the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.
>
> *As the inhibition of the statute applies irrespective of the motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the free-*

dom of trade and commerce but also as beneficial to the public. * * *

The real question comes to this—May the state, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, *inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents?* Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse." (Italics added.)

That evils inherent in objectionable forms of price competition, may be reached by legislation which is properly limited in its scope so as to apply only to those forms of price competition wherein the evil is present, is not denied by this decision, and is affirmed in *Central Lumber Co. v. South Dakota,* 226 U. S. 157, 57 L. ed. 164, 33 Sup. Ct. 66. This case recognizes that price discrimination, committed with an intent to injure competition, is unjustifiable and therefore properly may be the object of remedial legislation.

A similar result was reached in *Tyson v. Banton, supra,* when the New York legislature, being of the opinion that certain frauds were practiced on the public in connection with the sale of theatre tickets, enacted a law prohibiting their resale at a price more than fifty cents in excess of the price printed on the tickets. The statute was sought

to be defended as an appropriate method of protecting the public against extortion, fraud, etc. This court there said (273 U. S. at p. 443):

> "One vice of the contention is that the statute ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with,—Com. v. O'Brien, 12 Cush. 84, 90), and fixes the resale price as well where the evils are absent as where they are present. *It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught.*" (Italics added.)

Similarly, in *Adams v. Tanner, supra,* it was said (244 U. S. at pp. 594, 595):

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

Decisions of the California Supreme Court are in accord in recognizing this limitation on the exercise of the police power.

Varney & Green v. Williams, 155 Cal. 318, 100 Pac. 867;

Pacific Rys. Adver. Co. v. City of Oakland, 98 Cal. App. 165, 276 Pac. 629.

The Fair Trade Law ignores the fundamental line of demarcation between the permissible and the prohibitive in police regulation laid down in the foregoing decisions. In its aim to scotch the unscrupulous and predatory price cutter, it likewise deters the legitimate merchant in his daily endeavor to develop his business by the peaceful and honest use of his skill and industry. In brief, it is but another example of the ineptness of government in trying to deal in universals, with practices that should be dealt with, if at all, only by legislation meticulously drawn so as to confine the punishment which it inflicts to those who are perpetrating the evil.

2. The Unreasonable Scope of the Law Is Not Justified By Any Alleged Difficulty Which May Be Claimed to Exist in Devising or Enforcing a Proper Statute.

The assertion has been made, that granting that the scope of the statute is too broad, justification may be found in the difficulty of pricking out the nice line of demarcation which necessarily exists between fair competition and predatory price cutting. In reply to this contention, it is enough to say, that such difficulty, if it exists, does not justify the adoption of methods which are arbitrary and unreasonable. The deliberate violation of per-

sonal rights and liberties cannot be condoned by legislative disingenuity.

Tyson v. Banton, supra;

Adams v. Tanner, supra;

Schlesinger v. Wisconsin, supra;

Varney & Green v. Williams, supra;

Wolf v. Fuller, 87 N. H. 64, 171 Atl. 193;

Tolliver v. Blizzard, 143 Ky. 773, 137 S. W. 509, 34 L. R. A. (N. S.) 890.

In refuting this very argument in *Tyson v. Banton,* this court said (273 U. S. at p. 445):

> "But the difficulty or even the impossibility of thus dealing with the evils, if that should be conceded, constitutes no warrant for suppressing them by methods precluded by the Constitution. Such subversions are not only illegitimate but are fraught with the danger that, having begun on the ground of necessity, they will continue on the score of expediency, and, finally, as a mere matter of course. Constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, *and they may not be remolded by law makers or judges to save exceptional cases of inconvenience, hardship or injustice.*" (Italics added.)

In *Schlesinger v. Wisconsin, supra,* there was involved the validity of an act providing for the imposition of an inheritance tax whenever a transfer was made in contemplation of death. The act provided that every transfer made within six years prior to death and without an adequate consideration was presumed to have been made in contemplation of death. The facts in the case dis-

closed that although the transfers in issue were made within the six year period, actually they had not been made in contemplation of death. The court held the act unconstitutional, making the following observations (270 U. S. at p. 240):

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the Legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an enactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B.' Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

The rule is equally well recognized in the state courts. An excellent statement is to be found in *Tolliver v. Blizzard, supra,* where the court said (143 Ky. at p. 776):

> "The test in every case is: Is the prohibition of a particular business or the sale of a particular article necessary to prevent the infliction of a public injury? It is not sufficient that the public sustain harm from a certain trade or employment as it is conducted by some engaged in it. *Because many men engaged in the calling persist in so conducting the business that the public suffers, and their acts cannot otherwise be effectually controlled, is no justification for a law which prohibits an honest man from conducting the business in such a manner as not to inflict injury upon the public."* (Italics added.)

And in *Wolff v. Fuller,* 87 N. H. 64, 174 Atl. 193, the court held unconstitutional a statute imposing restrictions on itinerant storekeepers, but the terms of which statute were broad enough in their application, to restrict the business of temporary storekeepers and others. In reply to the contention that any other type of statute would be ineffective, the court said (174 Atl. at p. 198):

> "The argument that an itinerant vendor may readily escape the regulations of the law by a false claim difficult of disproof that he is a temporary storekeeper furnishes no sufficient reason for imposing the regulations properly made conditions for his engagement in his business upon those not therein engaged. The difficulty of proof is not formidable, and is more assertive than actual. * * * *The fact that status may be difficult of proof does not authorize the Legislature to fix a definition for it which includes many who are not of the class."* (Italics added.)

No excuse can therefore be tendered on the grounds of expediency, for the unwarranted scope of the Fair Trade Act, which, in attempting to strike down the merchant guilty of destructive price cutting, sinks its weapon into the innocent flesh of the honest merchant as well.

3. *The Fact That the Law Prohibits Ordinary, Legitimate, Price Competition Cannot Be Justified by Any Alleged Injury Which May Be Claimed to Result From Such Competition.*

Equally fallible is the contention that, granting that the act is broad enough to apply to price competition which is innocent, honest, fair and free from any recognized specie

of commercial overreaching, as well as to the obnoxious variety, nevertheless, if such competition injures the manufacturer or a competitor, the Legislature, acting, presumably, in the interest of the public, may prohibit it. The flaw in this argument is that it posits as a datum, the assertion that a sufficient public interest to justify the exercise of the police power is to be found in the protection of business men against the risks of ordinary, honest, business competition. This is indeed a strange doctrine, which, it is safe to say, will hardly strike the sympathetic ear of American business men. Into the very warp and woof of the American system of private competitive enterprise has been woven a recognition of the right of business men to engage in honest and innocent business competition; competition not characterized by malice, fraud, deception or other unfair dealings. The natural and honest rivalry between one business man and another, each striving for business and profits, constitutes the competition which has been called "the life of trade".

The fact that such clean and honorable competition may *incidentally* work substantial injury upon others is not material. The doctrine of *sic utere tuo,* etc., is clearly inapplicable to the present system of private competition under a capitalist economy, which necessarily predicates the existence of noncompensatory injury among competitors. Since the early Schoolmasters Case of 1410, in which two schoolmasters unsuccessfully brought suit against a newcomer whose competition had brought a drastic reduction of fees, it has been held that injury re-

sulting from the normal and usual effects of competition, while no different in kind or extent from that resulting from methods clearly unfair, is *damnum absque injuria.*

Schoolmasters Case, Anonymous, Y. B. 11 Hen. IV, f. 47, p. 21 (1410);

63 *Corpus Juris,* p. 413, par. 110, and cases there cited;

Handler: Unfair Competition, Vol. 21, Iowa Law Review, No. 2 (Jan. 1936), p. 181;

Wyman:Competition and the Law, 15 Harv. Law Review, p. 427 (Feb. 1902).

As stated in *Boggs v. Duncan-Schell Furniture Co.,* 163 Iowa, 106, 143 N. W. 483 (163 Iowa, at p. 115):

> "Every man has the legal right to advance himself before his fellows, and to build up his own business enterprises, and to use all lawful means to that end, although in the path of his impetuous movements he leaves strewn the victims of his greater industry, energy, skill, prowess, or foresight."

While the legislature is not bound by the comparatively narrow common law traditions, in defining and prohibiting acts of unfair competition, but is free to follow its creative impulses, such legislation being grounded in the police power, must bear a real and substantial relation to the public welfare. Appellant respectfully submits that where a business man's conduct—in this case, his pricing policy—is not characterized by anything fraudulent, deceptive or dishonest, and where it conforms in all respects to the approved standards of business conduct, as generally understood and practiced by legitimate merchants, the public welfare is not directly at stake, and the

legislature has no more power than did the courts at common law, to interfere with his business policies. Thus while the common law concept of unfair competition has been, and is constantly being, expanded by statute to cover new situations, as they arise, there has always gone along with such development, a recognition of the fact that legislatures, as well as courts, are without power to extend the concept of unfair competition to acts which restrict ordinary competition, as it is generally understood in trade and commerce. It is well established that the police power does not extend to protecting classes or groups of business men against the risks of ordinary business competition.

New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371;

State v. Old Tavern Farm, 133 Me. 468, 180 Atl. 473;

State v. Latham, 115 Me. 176, 98 Atl. 578.

For example, while the term "unfair methods of competition" as used in the Federal Trade Commission Act has been held to be broader than "unfair competition" at common law (*Schechter Poultry Corporation v. United States,* 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947), this court has said of these words that—

> "They are clearly inapplicable to practices never heretofore regarded as opposed to good morals, because characterized by deception, bath faith, fraud or oppression, or as against public policy because of their

dangerous tendency unduly to hinder competition or create monopoly. *The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.*" (Italics added.)

Federal Trade Commission v. Gratz, 253 U. S. 421, at pp. 427,428, 64 L. ed. 993, 40 S. Ct. 572.

To the same effect:

Federal Trade Commission v. Curtis Pub. Co., 260 U. S. 568, 67 L. ed. 408, 43 S. Ct. 210;

National Biscuit Co. v. Federal Trade Commission, 299 Fed. 733 (Cert. Den. 266 U. S. 613, 45 S. Ct. 95, 69 L. ed. 468).

In *Federal Trade Commission v. Sinclair Refin. Co.,* 261 U. S. 463, 67 L. ed. 746, 43 S. Ct. 450, this court said of the powers of the Commission (261 U. S. at pp. 475, 476):

"It has no general authority to compel competitors to a common level, to interfere with ordinary business method or prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs."

The mere sale of goods below cost, in the absence of unfair dealing has been held not to constitute an unfair method of competition under the Federal Trade Commission Act.

Sears, Roebuck v. Federal Trade Commission, 258 Fed. 307 (C. C. A.).

And under Section 2 of the Clayton Act which prohibits price discrimination, it has been held that the act extends only to price discrimination which lessens competition or tends to create a monopoly. In the absence of such circumstances the act does not apply, even where the defendant cuts prices as a form of advertising.

Kresge Co. v. Champion Spark Plug Co., 3 Fed. (2d) 415.

It has already been observed that state laws which fail to distinguish between innocent and malicious price cutting are invalid.

Fairmont Creamery Co. v. Minnesota, supra.

Numerous trade conference rules adopted at the trade conferences sponsored by the Federal Trade Commission recognize the same distinction.

C. C. H. Federal Trade Regulation Service, Vol. II, 7th ed., index p. 4027; pp. 4051-4456.

Thus in judicial decisions, legislative action and administrative rules, there has consistently been recognized the absence of any governmental authority, even under the police power, to upset the plane of normal business competition by attempting to convert ordinary and customary business practices into acts of unfair competition.

In the present case the lack of such power is supported by the strongest of considerations. The injury suffered by a manufacturer or retailer from price competition is not for them an inescapable one. On the contrary, it is self-invited, resulting directly from the particular method of distribution selected by the manufacturer for the distribution of his goods. It is unequivocally established that a manufacturer may achieve the result of maintaining a uniform consumer price by retaining title to his goods throughout the process of distribution.

> *United States v. General Electric Co.*, 272 U. S. 476, 71 L. ed. 362, 47 S. Ct. 192;
>
> *Federal Trade Commission v. Curtis Pub. Co.*, 260 U. S. 568, 67 L. ed. 408, 43 S. Ct. 210.

It has been pertinently remarked in this connection that:

> "If there exists a real economic basis for the enormous advertising expenditures by which manufacturers endeavor to weave bonds of consumer goodwill which stretch over the heads of distributors, can it be doubted that the protection of those tenuous threads by the creation of true forms of agency or the extension of industrial integration marketwards will be justified."
>
> National Industrial Conference Board: Public Regulation of Trade Practices (1929) at p. 99.

And see:

> Stevens: Resale Price Maintenance as Unfair Competition, 19 Col. Law Review, p. 265, at p. 273 (June, 1919).

In so far as it applies to honest and legitimate price competition, the present legislation has as its sole object, the protection of manufacturers who have failed to adopt such a system, but prefer to distribute and sell their product through independent wholesale and retail outlets.

In its essence, therefore, the Fair Trade Act is an attempt to maintain a system of distribution by which, through extensive advertising, manufacturers seek to make the entire distributive system merely an agent for the manufacturer, and at the same time avoid the legal responsibility attendant upon such relationship. In brief, it is designed to this extent, *solely to protect a particular system of distributing consumer's goods.* Certainly the public welfare does not require that such a system of distribution, which has been deliberately selected by manufacturers to secure the practical benefits of a legal relationship whose burdens they are unwilling to assume, should be maintained over some other system, *at the expense of property rights.*

To spin a benefit to the public welfare out of such gossamer threads may be philosophically possible—practically it is defeated by the implications of its own tenuousness. For if a manufacturer may select a particular system of distributing his goods and then, on the grounds of public welfare, appeal to the legislature for protection of his capital investment in good will, against the hazards of ordinary and honest price competition, by the same token he may appeal to the legislature to protect his capital investment in machinery against the competitive risk arising from the marketing by a competitor of a new substitute for his product. It is unnecessary to delineate the consequences which would follow from the adoption of such

a view. It may be dogmatically asserted that such interpretation of the general welfare essential to the permissible exercise of the state police power, would invite a revolution in our concept of the function of government in our present economy.

It should be evident, therefore, that injury *per se* is not the *sine qua non* for legislative interference with trade practices; where the prohibited acts do not depart from the generally accepted standards of what constitutes fair play. Accordingly, the mere fact that appellees claim that they will be injured as a consequence of appellant's pricing policy [Tr. of Record, p. 12] does not justify the statute in unconditionally prohibiting all price competition.

Since Section 1½ of the Fair Trade Act, on its face, does not confine itself to price competition which can be classified as unfair, according to any accepted norms of business ethics, but extends as well to competition which is essentially legitimate, and since the latter type of competition, even though it may at times work an injury, does not affect the general welfare so as to warrant its prohibition at the expense of destroying personal and property rights, the act is necessarily lacking in any substantial relation between its assumed purpose and its actual provisions.

It will not be seriously contended that the allegations of the complaint, that appellant maliciously cut prices without justification, or that he conspired to injure the appellees, makes this argument unavailable in the present case. Appellees' rights must be measured by the statute, the deficiencies of which cannot be supplied by a pleading. These allegations are not ingredients of the statutory offense created by the statute and are totally immaterial,

in making out a case under it. They are not, therefore, admitted by appellant's demurrer.

County of Tulare v. County of Kern, 132 Cal. App. 462, 22 Pac. 750;

French v. Senate of California, 146 Cal. 604, 80 Pac. 1031;

United States v. Van Auken, 96 U. S. 366, 24 L. ed. 852;

Pierce Oil Corporation v. Hope, 248 U. S. 498, 63 L. ed. 381, 39 S. Ct. 172.

Moreover, being mere conclusions of law, they must be ignored.

Pierce Oil Corporation v. Hope, supra;

Pennie v. Reis, 132 U. S. 464, 33 L. ed. 426, 10 S. Ct. 149;

Norta v. United States, 294 U. S. 317, 79 L. ed. 907, 55 S. Ct. 428, 95 A. L. R. 1326.

Consequently, the pertinent application herein of the principles above discussed, cannot be questioned.

2. *The Statute May Be Invoked in Favor of Those Not Entitled to Its Protection.*

Not content with sweeping up the innocent along with the guilty in its dragnet, the statute is equally obnoxious to the concept of a reasonable police regulation in that it may be invoked by a large class of persons not entitled to its protection. Admittedly, it is designed to protect the good will of a manufacturer or producer, built up through extensive advertising and other devices, as a result of which he may reasonably expect continued public patron-

age. On the grounds of an alleged need for protecting the good will attached to established, widely advertised and well known trade-marks, trade-names and brands, the inroads which the statute makes upon personal and property rights have been defended. But unhappily its scope is not limited to this class of goods. While its title states that it is directed against injurious practices in the distribution of articles "of standard quality under a distinguished trade-mark, brand or name" (Calif. Stats. 1931, page 583, as amended by Stats. 1933, page 793), the body of the act is not so limited; on the contrary, it affords protection in the case of all contracts relating to the sale of a commodity "which bears or the label or content of which bears, the trade-mark, brand, or name of the producer or owner * * *."

It is immediately apparent that in its scope the body of the act goes far beyond anything contained in its title. Nowhere is the act itself limited to articles "of standard quality" or to articles sold under a "distinguished trade-mark, brand or name". On the contrary, any manufacturer, producer or distributor, whether the article he deals in is of "standard quality" or not, whether it bears a "distinguished trade-mark, brand or name" or not, may invoke the aid of the statute. All that is necessary is that he affix his *name* to the product. It matters not that his name is totally unknown. It may not be known to ten people. It may be without value as a trade-name, and the manufacturer may have acquired no good will under it deserving of protection. The statute still gives him a cause of action. Anyone whose name, however insignificantly or inconspicuously placed, appears on a package or container or on the contents, and though the product

itself is simply anonymously labeled "flour", "wheat", "soap", etc., is an object of the statute's beneficence. (Compare in this connection, *Borden's Farm Products Company, Inc. v. Ten Eyck*, ... U. S. ....., 80 L. ed. 469, 56 S. Ct. 453, referring to the New York Milk Control Act, where protection was afforded to independent milk dealers against those having a "well advertised trade-name", and which required a finding on the point by the administrative authority, after a hearing duly had.)

Under these circumstances, the act is bound to permit price fixing with reference to almost every type of consumer's goods. Very few articles are wholly anonymous in origin. Somewhere on the package, container or the contents of almost every article of retail trade, can usually be found at least the name of the manufacturer or producer, which is sufficient to bring it within the operation of the act. And those products which are without such name can easily be brought within the act, by the simple device of adding one.

The act thus extends across the entire field of retail trade, protecting those not entitled to protection and penalizing those not guilty of wrong. It would be difficult to find a more flagrant violation of the rule which requires that a reasonable relation exist between police regulations and the object to which they relate, and which precludes as arbitrary and unreasonable "shot gun legislation"—legislation whose pellets fly helter and skelter in every direction in the hope that thereby it will bring down its lawful prey. Appellant submits that to uphold the Fair Trade Act under these circumstances, would not only deprive appellant of valuable personal and property rights but would also set a dangerous precedent by which all

honest merchants will ultimately be legislated out of existence.

Appellant is aware that the complaint herein alleges that the particular articles here involved are trademarked [Tr. of Record, pages 2-3] and that it has been said that a litigant may object to the constitutionality of a statute only insofar as it is sought to be used against him. Yet, this court has also held, that where constitutional rights of an individual are involved, as in the present case, the proper test to be applied in passing upon a statute's validity is to determine, not what has been done under the act, not what the parties have done in the case before the court, but rather what can by its authority be done under and by virtue of its provisions.

Montana Company v. St. Louis Mining and Milling Co., 152 U. S. 160, 169, 170, 38 L. ed. 398, 14 S. Ct. 506;

Employers' Liability Cases, 207 U. S. 463, 52 L. ed. 297, 28 S. Ct. 141.

And this is the generally recognized view, both in state and federal decisions.

Minneapolis Brewing Co. v. M'Gillivray, 104 Fed. 258, 269;

Samson v. Perry, 17 Fed. (2d) 1, 2;

Central National Bank v. McFarland, 20 Fed. (2d) 416, 418;

City of Los Angeles v. Lewis, 175 Cal. 777, 167 Pac. 390;

Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 Pac. 39;

State v. O'Leary, 43 Mont. 157, 115 Pac. 204.

Assuming that this particular vice in the statute is not present in the instant case, nevertheless a prior attack by another litigant affected by this vicious feature of the statute would unquestionably render it entirely void; appellant's substantive rights should not be prejudiced by the fortuitous sequence of suits. (Note: 47 *Harvard Law Review*, 677, at p. 680.)

This fault in the statute is not remedied by the fact that the price competition which constitutes unfair competition under the act is actionable only "at the suit of any person damaged thereby". As previously pointed out herein, injury may result from forms of fair competition which cannot be made actionable by statute, and this clause in the act is, therefore, no assurance of protection from the arbitrary operation of the statute.

(B) THE STATUTE IS ARBITRARY AND DISCRIMINATORY IN THAT IT DELEGATES TO A PRIVATE INDIVIDUAL ARBITRARY POWER TO DETERMINE THE EXTENT TO WHICH APPELLANT MAY DEAL IN HIS PROPERTY.

It is trite law that legislative authority over private property or personal rights cannot be delegated to, or vested in, administrative officers without setting up some definite standards to guide their action.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220. 6 Sup. Ct. Rep. 1064;

Schechter Poultry Corporation v. United States, *supra.*

With much greater force does this rule apply where an attempt is made to delegate such arbitrary power to private individuals.

Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 33 Sup. Ct. Rep. 76;

Washington v. Roberge, 278 U. S. 116, 73 L. ed. 210, 49 Sup. Ct. Rep. 50;

Carter v. Carter Coal Company and Others, ... U. S. ....., 80 L. ed. 749, 56 Sup. Ct. Rep. 855.

In the first case above quoted the court held unconstitutional a city ordinance which permitted the owners of two-thirds of the property abutting on any street to require that the city street committee establish a building line binding upon all of the property owners on the street. The court said (226 U. S. at pp. 143, 144):

> "The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determine not only the extent of use but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously."

In the *Roberge* case, a city zoning ordinance prohibited the erection of a philanthropic home, without the written consent of the owners of two-thirds of the property within 400 feet of the proposed building. The court overthrew the ordinance, stating (278 U. S. at pp. 121, 122):

> "The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. Yick Wo v. Hopkins, 118 U. S. 356, 366, 368. *The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment.* Eubank v. Richmond, 226 U. S. 137, 143; Browning v. Hooper, 269 U. S. 396." (Italics added.)

In the *Carter* case the court had before it, *inter alia*, the validity of certain provisions of the Bituminous Coal Conservation Act of 1935, which delegated the power to fix maximum hours of labor and minimum wages to a part of the producers and miners of coal, whose decisions on such matters were to be binding upon all. This court concluded that such delegation was a denial of due process of law, stating (80 L. ed. at pp. 769, 770):

> "The effect, in respect of wages and hours, is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority,

since, by refusing to submit, the minority at once incurs the hazard of enforcement of the drastic compulsory provisions of the act to which we have referred. To 'accept', in these circumstances, is not to exercise a choice, but to surrender to force.

"The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. * * *

"* * * one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. Al. A. Schechter Poultry Corp. v. United States, 295 U. S. at p. 537, 79 L. ed. 1584, 55 S. Ct. 837, 97 A. L. R. 947; Eubank v. Richmond, 226 U. S. 137, 143, 57 L. ed. 156, 159, 33 S. Ct. 76, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192; Washington *ex rel* Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 121, 122, 73 L. ed. 210, 213, 214, 49 S. Ct. 50, 86 A. L. R. 654."

The application of the above enunciated principles to the present case is clear.. Assuming that so-called "predatory" or other obnoxious forms of price cutting may be

prevented by legislative means which do not overstep the boundaries of the evils sought to be reached, such legislative means are not employed where, as here, they are vested in the uncontrolled discretion of private individuals who have the unrestricted power to fix the price at which another person may sell his property and the arbitrary right to determine what constitutes fair price competition on the part of such person. The opportunities for arbitrary and discriminatory applications of the statute resulting from this situation are boundless; the invitation to utilize them, irresistible.

In the first place the statute, even though it covers an almost unlimited field of commodities including necessities of life, contains no provision for administrative or judicial review to make certain that the prices fixed will be reasonable. Thus there is conferred on the manufacturer the power to fix unreasonable and arbitrary prices.

> "The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices."
>
> *United States v. Trenton Potteries,* 273 U. S. 392 at p. 397, 71 L. ed. 700, 47 S. Ct. 377.

The danger thus presented is not imaginary but real. During 1925 the Canadian druggists organized the Proprietary Articles Trade Association which was designed to accomplish resale price maintenance through the establishment of standard margins of profit. The association was broken up in October 1927 under the terms of the Combines Investigation Act. The recorded results were that consumer prices unduly rose (*Haring: Retail Price Cutting* (1935), p. 195). A similar result has been

prophesied for statutory resale price maintenance in this country (*Federal Trade Commission Report on Resale Price Maintenance,* Part II, pp. 163-5). Without necessarily joining in this prediction, it is enough to assert that the present statute confers on private individuals at least the *power* to fix unreasonable and arbitrary prices.

Moreover, the act does not require that the manufacturer sell his product at the same uniform price, even to the same class of retail or wholesale purchasers. And the contracts fixing resale prices are not required to be uniform or consistent. Thus, the manufacturer may sell his product at varying discounts, or even at less than cost, to some wholesalers or retailers and at "standard" prices to others. Discriminatory advertising allowances, free deals, rebates and other similar devices may be used to grant special concessions to some and not to others. Such devices are already in widespread use.

Haring: Retail Price Cutting, Chapters 4 and 5;
Seligman & Love: Price Cutting and Price Maintenance, pages 132-136.

Coupled with the failure of the statute to recognize such favoritism in the terms of purchase from the manufacturer, is the inevitability of arbitrary operation of the act in its application to retail sales. It prohibits the making of sales below the price fixed by the manufacturer in "any contract" entered into with a third party. Suppose the manufacturer enters into two contracts prescribing two different resale prices for retailers. Which of such prices is to govern,—the higher or the lower? The act does not say, and a retailer who has knowledge of both prices is required to choose between them at his

peril. Moreover, since the manufacturer is not required to maintain a uniform system of contracts or of resale prices, manufacturer X may fix a resale price in a contract with B and a higher one in a contract with C; thereupon retailer C, by notifying B of the resale price fixed in C's contract, may prohibit B from selling below that price. Thus B is prevented from reselling the commodities which he purchased from X *at the very price specified in his contract with X*. Moreover, X may sell to A without imposing any price restriction whatsoever, and to B he may sell subject to resale price restrictions. B is then permitted to sue A for damages for knowingly reselling below the price fixed in B's contract, although X has not prohibited A from the making of such sales.

Again, all that the statute requires is that a retailer have *notice* of the price fixed by the manufacturer. It does not require that a copy of the contract be delivered to any merchants against whom the manufacturer may desire to enforce resale price restrictions. Thus a merchant, informed of the resale price fixed in a contract, in order to determine whether he is bound by the price therein fixed, must decide at his peril whether such contract is legal and binding upon the parties thereto. Moreover, the act does not require that a retailer, once notified of a price restriction, be informed of any change in the terms thereof. In the contracts sued on in the instant case, such change may be effected by appellees at any time upon ten days' written notice to the other party to the contract. [Tr. of Rec. p. 19, Section 4 of the Agreement.] Assuming such provisions to be valid (compare Columbia Law Review, Vol. 36, No. 2 (February, 1936), p. 293), it is clear that if appellant is forced to abide by

the prices fixed by appellees upon receiving notice thereof, he is at least entitled to receive notice of any changes made therein; otherwise he is in a position of being required, at his peril, to continue to sell for the fixed price, even though appellees, without notice to appellant, may have favored appellant's competitors with a reduction of such price ten days after giving appellant such notice.

It would be harmful enough if this arbitrary and discriminatory power over appellant's property which the act thus sanctions were vested in an administrative officer or agency; it would be more harmful if it were vested in some disinterested private person. It is doubly harmful where, as here, it is vested in those who are his direct business competitors. One person may not be permitted to regulate the business of another, and especially of a competitor. As this court stated in *Carter v. Carter Coal Company, supra* (..... U. S. ....., at p. .....; 80 L. ed. at p. 169):

> "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, *but to private persons whose interests may be and often are adverse to the interests of others in the same business.*" (Italics added.)

There is no necessity for further enumeration of mischievous consequences which would follow if such delegation were permitted to go unchallenged in the present case. It is enough to recognize that by the rule laid down in the foregoing decisions the law unequivocally thwarts it.

There is no solace for appellees in the contention that these arbitrary and discriminatory features are not all raised in the instant case. It has already been pointed out herein that what may be done under an act of this

kind is a proper test in determining its validity. (*Montana Company v. St. Louis Mining etc. Co., supra.*) Moreover, these oppressive features constitute a standing invitation to a competitor to inflict injury upon appellant, and thus inhere in the very nature of the statute. These the court may properly consider, in determining the nature and extent of the unrestrained delegation of power which the act permits. In *Carter v. Carter Coal Company, supra.* this court, in holding unconstitutional the labor provisions of the Bituminous Coal Conservation Act of 1935, pointed out the arbitrary and discriminatory manner in which such provisions might operate in different localities and under various conditions, despite the fact that none of these circumstances were present in the case before the court. In *Eubank v. Richmond,* after pointing out some of the harmful and arbitrary consequences which the act permitted, but which were not present in the case, this court said (226 U. S. at p. 144):

> "We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence—even, it may be, the kind of business or character of residence. * * * If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power."

Similarly here, although not all of the arbitrary features above pointed out have come out in the present case, they

do show how the act, in its tendency and instances, enables the convenience or purpose of appellant's business competitors to control appellant's property rights. And if it be said that these conditions are not here present, it may likewise be answered that there is control of the property of appellant by others, and this is the vice in the enactment.

The suggestion of the California Supreme Court that these iniquitous situations may be avoided by the courts in enforcing the act, since the chief relief under the act would be equitable (91 Cal. Dec. at p. 359), is, we respectfully submit, untenable. An action for damages is equally available to anyone injured and, in any event, the equitable discretion of the court is not a valid substitution for constitutional protection.

> *Roller v. Holly,* 176 U. S. 398, 409, 44 L. Ed. 520, 20 Sup. Ct. 410;
>
> *Louisville & Nashville RR. v. Central Stock Yards Co.,* 212 U. S. 132, 144, 53 L. Ed. 441, 29 Sup. Ct. Rep. 246.

As was said in *Roller v. Holly,* 176 U. S. at p. 409:

> "The rights of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

It follows that section 1½ of the Fair Trade Act is arbitrary and discriminatory in vesting uncontrolled power over appellant's property in private persons. This defect, coupled with the utter failure of the statute to indicate a real and substantial relation to a proper legislative purpose, already pointed out herein, completely dispels any suggestion that it is a permissible exercise of the police power.

III.

The Statute Is Ambiguous, Indefinite, and Unintelligible and for These Reasons Void.

While section 1½ of the California Fair Trade Act is an all-embracing price-fixing statute, it purports to require, as a condition precedent to the enforcement of liability under it, proof that the commodity involved is in "fair and open competition with commodities of the same general class produced by others". This it does by confining its operation to the commodities referred to in section 1 of the act. If in a given case any of these conditions do not exist, the retailer is not bound, even though he has notice of the restrictions. Thus these conditions become the sole standards which mark and define the limits of permissible price competition under the statute. They constitute an integral part of the very definition of the statutory tort which the act creates.

Equally significant is the fact that the duty of determining the continuing existence of these standards is imposed squarely on the shoulders of the retailer. It follows that the ability of the retailer to comprehend their intent, meaning and scope is of prime importance, as is likewise the facility with which he is enabled to determine their continuing existence as to the commodities which he carries for sale. To the extent that he possesses this knowledge, he may ignore safely the inhibitions of the statute in cases in which one or more of these requisite conditions are absent; to the extent that he is unable to grasp it, he acts at his peril, for if in his attempt to ascertain these facts he guesses wrongly, he becomes guilty of unfair competition under the statute. The act contains no provision exculpating one who violates its pro-

visions through ignorance, or through inability to understand their meaning and scope.

If, therefore, the standards laid down by the statute are so vague, uncertain and ambiguous that they can neither be understood nor applied by any reasonable person, the prudent retailer, from motives of self-protection against costly litigation and possible judgments, will be forced to assume that they are present in every case. Thus the conditions necessary to bring a commodity within the statute are not conditions, the standards laid down are not standards, and the statute is distorted by legislative incoherence into an entirely different form and substance. When, as in the present case, such statute purports to deal with personal or property rights, such vagueness, uncertainty and ambiguity in its terms and in the definition of the offense which it seeks to create, renders it violative of due process and, therefore, unconstitutional. It has long been settled by repeated decisions of this court that a statute which either forbids or prohibits the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, violates the first essential of due process of law.

United States v. L. Cohen Grocery Co., 255 U. S. 81, 65 L. Ed. 516, 41 Sup. Ct. 298, 14 A. L. R. 1045;

Connally v. General Construction Co., 269 U. S. 385, 70 L. Ed. 322, 46 Sup. Ct. 126;

International Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. Ed. 1284, 34 Sup. Ct. 853;

Weeds, Inc., v. United States, 255 U. S. 109, 65 L. Ed. 537, 41 Sup. Ct. 306;

Cline v. Frink Dairy Co., 274 U. S. 445, 71 L. Ed. 146, 47 Sup. Ct. 681;

A. B. Small Co. v. American Sugar Refining Co., 267 U. S. 233, 69 L. Ed. 589, 45 Sup. Ct. 295;

Champlin Refining Co. v. Corporation Commission, 286 U. S. 210, 76 L. Ed. 1062, 52 Sup. Ct. 559, 86 A. L. R. 403.

The rule is similar in the state courts.

Standard Chemicals Corp. v. Waugh Chemical Corp., 231 N. Y. 51, 131 N. E. 566, 14 A. L. R. 1054;

People v. Mancuso, 255 N. Y. 463, 175 N. E. 177, 76 A. L. R. 514;

Vallat v. Radium Dial Co., 360 Ill. 407, 196 N. E. 485, 99 A. L. R. 607;

People v. Pace, 73 Cal. App. 548, 238 Pac. 1089;

In re Schmolke, 199 Cal. 42, 248 Pac. 244.

This principle applies as well to civil cases as to criminal cases.

A. B. Small Co. v. American Sugar Refining Co., supra;

Standard Chemicals Corp. v. Waugh Chemical Corp., supra;

Vallat v. Radium Dial Co., supra.

The accepted test for determining the sufficiency of statutory standards is whether the words which comprise the standards have either acquired a recognized meaning

at common law or have some technical or special meaning known to those required to use them.

United States v. L. Cohen Grocery Co., supra;

Weeds, Inc., v. United States, supra;

A. B. Small Co. v. American Sugar Refining Co., supra;

Connally v .General Construction Co., supra;

Champlin Refining Co. v. Corporation Commission, supra;

Vallat v. Radium Dial Co., supra;

People v. Mancuso, supra.

Thus, in *Connally v. General Construction Co., supra,* this court said: (269 U. S. at p. 391)

> "* * * the decisions of the court, upholding statutes as sufficiently certain, rested upon the conclusion that they employed rules or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them * * * or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ."

In *Champlin Refining Co. v. Corporation Commission, supra,* the court had before it the sufficiency as a statutory standard of the expression "waste" as applied to the production of oil. In rejecting this expression, the court said: (286 U. S. at pp. 242, 243)

> "The general expressions employed here are not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to employ them with any reasonable degree of certainty."

In *Vallat v. Radium Dial Co., supra,* the Illinois Supreme Court stated the rule as follows: (360 Ill. at pp. 412, 413).

> "In order that the statute may be held valid, the duty imposed by it must be prescribed in terms definite enough to serve as a guide to those who have the duty imposed upon them * * * but if the duty is imposed by statute through the use of words which have not yet acquired definiteness or certainty and which are so general and indefinite that they furnish no such guide the statute must be declared to be invalid."

And in *People v. Mancuso, supra,* statutory standards were held inadequate: (255 N. Y. at p. 471)

> "* * * where neither accepted norms of conduct nor common-law traditions of customary diligence give definiteness and significance to the acts to be avoided (citing cases) not even a civil liability can rest upon a prohibition so vague and indeterminate."

It is also necessary that the subject matter of the standard must be available to the party required to apply it, *i. e.,* it must inhere in the transaction governed by the statute and not refer to something speculative or ulterior to the case.

> *United States v. L. Cohen Grocery Co., supra,* 255 U. S. at pp. 89-91;
>
> *Cline v. Frink Dairy Co., supra,* 274 U. S. at pp. 459, 460;
>
> *Champlin Refining Co. v. Corporation Commission, supra,* 286 U. S. at p. 243.

Appellant respectfully contends that the provisions of the Fair Trade Act hereinbefore referred to, flagrantly

violate the foregoing rules, and that for this reason the statute must be declared invalid. The expressions used in the statute "fair and open competition" and "commodities of the same general class produced by others" will be separately considered.

While at common law the term "unfair competition" was originally restricted to cases of "passing off", it has gradually become expanded so as to cover other classes of competitive torts.

Schechter Poultry Corp. v. United States, supra, at pp. 531, 532;

Handler: Unfair Competition, Vol. 21, Iowa Law Review, pp. 179-213 (Jan., 1936);

Nims on Unfair Competition, Chap. 19, pp. 770-812.

For our present purposes, however, it is not necessary to determine its precise meaning, for it is perfectly apparent that the expression "fair and open competition", as used in the present statute, is not its antithesis.

In the first place, the expression "unfair competition", whether considered in its restricted early common-law sense or in its present expanded use, refers to acts and conduct on the part of specific and identified persons, whereas the Fair Trade Act refers to *commodities* which are in "fair and open competition with *commodities* of the same general class", etc. Hence the expression "fair and open competition", as used in the act, refers, not to any fairness or unfairness in the *conduct of the manufacturer* in distributing and selling his goods but to some quality of the *commodity itself* which it may acquire, apparently, at any stage in its transit from the manufacturer to the

ultimate consumer. This introduces a new and novel kind of unfair competition into the law, the existence of which is judged, not by any unfair, harmful, or malicious acts on the part of the producer, but by some peculiar and indefinite attributes of the commodity which may be imparted to it by the manufacturer or by any one of a thousand or more wholesalers, jobbers or retailers through whose hands it passes.

Numerous acts which might be unfair competition on the part of the manufacturer are not necessarily related to the particular commoditiy which he produces. Illustrative of these are disparagement of a rival's goods, inducing breach of contract, obstruction of competitor's customers, commercial bribery, etc. Thus a manufacturer may personally engage in acts of unfair competition, but as long as the *commodity itself* is not in unfair competition, by the express language of the statute, he may require third parties to comply with his dictates as to its resale price. On the other hand, even though the manufacturer does not engage in acts of unfair competition, it does not follow that the commodity itself, which is the real criterion under the act, is not in unfair competition, for under the particular system of distribution to which the act relates, and which, presumably, it is the purpose of the act to protect, the commodity may be sold by numerous wholesalers, jobbers and retailers throughout the state. This is true in the present case. [Page 13 of Complaint, Tr. of Record pp. 8-9.] Obviously, the unfair tactics of any one or more of these classes or of any one or more individuals within any one of these classes, who participate in the distribution of the commodity, may constitute it, *pro tanto,* in unfair competition with other commodities.

Clearly then, the act refers to acts and conduct other than those embraced within the common law concept of unfair competition; to some new, unknown and undefined competitive condition which is referable to the commodity itself as it flows into the public's hands through the medium of thousands of jobbers, wholesalers and retailers throughout the state.

Moreover, it is not enough that the commodity be in fair competition with other commodities; it must also be in "open" competition. Appellant has been unable to find any commonly known or generally accepted common law meaning given to the word "open" or the expression "fair and open" in relation to the term "competition", and submits that there is none. That the legislature intended the word "open" to convey some meaning not included within the word "fair" cannot be questioned. It must be presumed that the legislature intends a meaning to be given to every word used in its enactments.

Wiborg v. United States, 163 U. S. 632, 41 L. Ed. 289, 16 S. Ct. 1127;

Platt v. Union Pacific Ry. Co., 99 U. S. 48, 25 L. Ed. 424.

It is important to note, also, that the standard "fair and open competition" is referable, not to facts which relate to the conduct of appellant in the case at bar, not to anything intrinsic in the present case, but to an extrinsic competitive condition which would impose on appellant the superhuman task of investigating the competitive status of appellees' commodity, not only with respect to appellees' own conduct in relation thereto, but also as it passes through the hands of numerous wholesalers and jobbers and thousands of retailers throughout the state. Such bur-

den cannot rightfully be imposed on appellant. This court has steadfastly rejected such ulterior standards which are disconnected entirely from the case at issue, or the party against whom the standard is invoked.

United States v. L. Cohen Grocery Co., supra;
Champlin Refining Co. v. Corporation Commission, supra, at p. 243.

It follows that the words "fair and open competition" are without foundation in any common law source, are devoid of any generally recognized meaning, and relate not to the conduct of the parties bound by the act, but to facts entirely foreign to the case. They must, therefore, be rejected as too ambiguous and uncertain to serve as statutory standards in the act.

We turn now to the expression "general class" in conjunction with which this term "fair and open competition" is used. It would appear hardly necessary to go beyond the common definition of the word "general" to demonstrate that it does not offer an intelligible standard to aid the merchant in determining the circumstances under which he is bound by the statute. According to Webster's New Unabridged Dictionary the word "general" means, among other things: "Not specific, not precise or definite." Thus, indefiniteness is part of the very definition of the term.

There is nothing to indicate what criterion is to be used in applying the term. If it be supposed that the use or purpose to which an article is put is controlling, confusion and uncertainty is bound to result. For example, suppose retailer A desires to sell a trade marked brand of olive oil at a price less than the manufacturer's fixed price.

He knows he may lawfully do so if it is not in fair and open competition with commodities of the same "general class" produced by others. He further knows, however, that olive oil is put to a myriad of uses, being used, in fact, for everything from salad dressing to skin beautifier and from a sunburn remedy to a health tonic. Manifestly, it is impossible for him to determine the general class to which it belongs. He knows not whether to classify it as a food, toilet article, or medicine.

If we substitute as a test the inherent qualities of the commodity, in lieu of its use or purpose, we are no closer to certainty of meaning. To what "general class" does a book such as "Anthony Adverse" belong? Does it include only works of fiction or does it include nonfiction as well? Does it extend to magazines and periodicals? Does it take in text-books and encyclopedias?

If price is to be controlling, the point is still uncertain. Is the general class to which Ingersoll watches belong limited to the class of cheap watches; does it include more expensive watches, like Bulova and Hamilton; does it include diamond watches; does it extend to all timepieces; does it embrace all jewelry?

Obviously, in each of the above cases, any one of the classifications could be justified, as well as any other, as being the "general class" to which the commodity belongs.

And what of the particular items involved in this action—lipstick, face powder and rouge? Does the "general class" to which Max Factor face powder belongs include only face powders? Does it include the class of face powders sold in Woolworth's, as well as the imported powders sold in the exclusive specialty shops? Does it include

cold creams? Does it extend to all cosmetics? Does it embrace all toilet articles?

The foregoing illustrations could be multiplied indefinitely. Enough has been said, however, to demonstrate the utter impossibility of placing on the words "commodities of the same general class" any tangible meaning which would enable the average merchant intelligently to determine whether he is or is not bound by the resale price restrictions which the manufacturer seeks to impose upon him.

The uncertainty of the expression "any contract" has already been adverted to in an earlier portion of this brief, and what was said there with respect to the arbitrary operation of the statute applies, as well, to the point now under discussion.

The combination of the expressions "fair and open competition", "commodities of the same general class produced by others", and "any contract", is fatal for the validity of the act. It would require legerdemain, not logic, to ascertain their combined meaning. It would be strange, indeed, if any judicial precedent could be found to sustain such nebulous expressions. Inevitably, all of the decisions point to an opposite conclusion.

Thus, in *United States v. L. Cohen Grocery Co., supra,* it was held that the standard of an "unjust and unreasonable price" was too vague to be sustained. In *Connally v. General Construction Co., supra,* it was held that the expression "current rate of per diem wages in the locality" was too vague. In *International Harvester Co. v. Kentucky, supra,* it was held that the expression "market value under fair competition and normal market conditions" was too uncertain to be sustained. In *Weeds, Inc., v. United*

States, supra, it was held that the standard of "excessive prices" was wanting in certainty. In *Cline v. Frink Dairy Co., supra,* it was held that a "reasonable profit" was insufficient. In *Champlin Refining Co. v. Corporation Commission, supra,* it was held that the term "waste", as used in a statute regulating oil production, was inadequate.

To the same effect are numerous decisions of state courts. Thus, in *People v. Pace,* 73 Cal. App. 548, 238 Pac. 1089, it was held that the expression used in a statute pertaining to the sale of securities "not made in the course of repeated and successive transactions of like or similar character" was too broad, vague and uncertain. In *In re Schmolke, supra,* the California Supreme Court held that the expression "usual transfer delivery zones" was void for indefiniteness. In *Vallat v. Radium Dial Co., supra,* it was held that the expression "reasonable and approved devices" was too vague.

The present case cannot escape the controlling force of these decisions. If such expressions as "unjust or unreasonable charge", "excessive prices", "current rate of per diem wage in the locality", "market value under fair competition and normal market conditions", "waste", "like or similar character", "zone", etc., are too indefinite to serve as legislative standards of conduct, *a fortiori* is such a combination of vague and indefinite terms as is comprised in the expressions "fair and open competition", "commodities of the same general class produced by others", and "any contract".

Since the provisions of the Fair Trade Act above referred to do not refer to any category established in the law, but in effect, are merely convenient designations

for whatever opinions a court or jury might have, they must be rejected as too indefinite, vague and ambiguous to constitute a permissible standard of conduct under the act. Without them the act itself becomes emasculated beyond recognition and its validity must, therefore, be denied.

Conclusion.

In conclusion, appellant respectfully contends that section 1½ of the California Fair Trade Act is unconstitutional, in that it deprives appellant of his liberty and property without due process of law, and that the judgment appealed from herein should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 79

CLARENCE G. KUNSMAN,

Appellant

vs.

MAX FACTOR & CO., AND SALES BUILDERS, INC.,

Appellees.

APPELLEES' BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 79.

CLARENCE G. KUNSMAN,

Appellant

vs.

MAX FACTOR & CO., AND SALES BUILDERS, INC.,

Appellees.

APPELLEES' BRIEF.

This case attacks the constitutionality of Section 1½ of the so-called Fair Trade Act of the State of California.[1] The ground is that it violates the Fourteenth Amendment of the Federal Constitution, because it is asserted that this section deprives appellant of his liberty and property without due process of law. The assignments of error are directed to Section 1½ only.[2]

The Supreme Court of California held, as applied to the facts of this case, that Section 1½ is constitutional. The court took for granted the validity of all other parts of the act except 1½, saying that the appeal before them presented "the single question: 'Is Section 1½ added to the Fair Trade Act of the State of California in 1933 (Stats. 1933, p. 793, *supra*), constitutional?'", and answered the question "yes." (*Max Factor* v. *Kunsman,* R. 24, 5 Cal. (2) 446, 55 Pac. (2) 177.)

[1] This section was added in 1933 (Stats. 1933, p. 793; Deering's Gen. Laws, Act 8782) to the Act as passed in 1931 (Stats. 1931, p. 583; Deering's Gen. Laws, Act 8782).

[2] R. 58, 59. See also R. 56, Appellant's Statement of Jurisdiction, pages 5, 6 and Appellant's brief, page 12.

We assume that the validity of any legislation is to be determined with reference to the facts of the case in which it is invoked, and without consideration of hypothetical cases with different facts. The situation here before the court is specific and concrete.

The Statute in Question.

The statute as passed in 1931 reads:

An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name.

The People of the State of California do enact as follows:

Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deterio-

rated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

SEC. 2. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

SEC. 3. The following terms, as used in this act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

SEC. 4. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

SEC. 5. This Act may be known and cited as the "Fair trade act."

Approved May 8, 1931
Effective August 14, 1931

The amendment passed in 1933 reads:

An Act to add a new section to the "Fair Trade Act" to be number 1½, relating to unfair competition.

The People of the State of California do enact as follows:

SECTION 1. A new section is hereby added to the "Fair Trade Act" to be numbered 1½ and to read as follows:

SEC. 1½. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Approved, May 8, 1933
Effective, August 21, 1933

I.

Statement of Facts.

This suit was instituted in the Superior Court of California, Los Angeles County. It was decided on a general demurrer to the complaint (R. 21) that "said amended complaint does not state facts sufficient to constitute a cause of action." The demurrer was sustained without leave to amend (R. 22). The Supreme Court of California reversed (R. 24). Defendant electing to stand on his demurrer, the trial court was ordered to enter judgment as prayed in the complaint (R. 54).

Plaintiffs were Max Factor & Co., a Delaware corporation and Sales Builders, Inc., a Nevada corporation. Max Factor & Co. are manufacturers of cosmetics under trade marks owned by them and registered in the Patent Office; Sales Builders, Inc., is the exclusive distributor of the Factor products. The defendant, under the name of Wilshire Drug Co., owns and operates a retail drug store at No. 8802 Wilshire Boulevard, Beverly Hills, California.[3]

The complaint alleges (R. 7):

> "That many years ago there developed in the drug trade a practice of cutting prices, both wholesale and retail, of well advertised commodities, well known to the public and sold and identified under distinctive trade marks, brands and names. That such products were offered by retail dealers at prices conspicuously lower than the marked or established prices of said commodities as so-called

[3] The complaint, according to the California practice, joined several "John Doe" defendants, which accounts for the use of the plural in its allegations.

'leaders' for the purpose of creating the impression that other goods, of which the prices were not well known, were sold at corresponding reductions, and that all articles dealt in by a particular dealer were sold by him at less than they could be obtained elsewhere. That the stores at which said practices were prevalent became known as 'Cut Rate Drug Stores.' That said practice of cutting known and established prices engendered a condition by which other dealers were forced to meet the cut prices advertised by their competitors, one cut produced another in retaliation, so that ultimately in a particular community well known articles identified by trade-marks, brands and names with an established price were offered at prices cut to a point which yielded no profit, and in many cases represented a loss. That said price cutting resulted in the destruction of all incentive on the part of dealers to sell such commodities and in their declining to handle or stock the same, and caused said dealers, when said commodities were called for by the public, to sell the same reluctantly, or to substitute, where possible, other products upon which profit could be made. That as a further result of said price cutting, the producer or owner of such identified merchandise whose goods had been handled in this manner, through no fault of his own, was deprived of a market and facilities for distribution, and his business and good-will seriously interfered with and in many cases destroyed. That the situation above described is particularly true in the state of California with respect to cosmetics and toilet articles, and extended gradually to other lines of merchandise. That to remedy this evil the Legislature of the state of California passed an act entitled 'An Act to Protect Trade-mark Owners, Distributors and the Public against Injuries [injurious] and Uneconomic Practices in the Distribution of Articles of Standard Quality under a Distinguished Trade-mark, Brand or Name.' Said

> act was approved on May 8, 1931, became effective August 14, 1931, is known as the 'Fair Trade Act,' and is chapter 278 of the Statutes of California of 1931. That the said 'Fair Trade Act' was amended by the Legislature of the state of California, which amendments were approved on May 8, 1933, and became effective August 21, 1933."

The complaint then states (R. 8) that on August 21, 1933, plaintiff Sales Builders, Inc., to protect its trade in the State of California, in trade-marked goods, and to protect itself against the injurious and uneconomic practices contemplated by the Fair Trade Act and to avail itself of the terms of such act, adopted a system of doing business by which written contracts were entered into between the plaintiff and its wholesale or jobbing distributors and between the plaintiff and retail druggists or other persons selling the Factor products within the State of California. Such contracts obligate the wholesale and jobbing distributors to sell the Factor products only to retailers who had entered into written contracts to sell Factor products at prices specified in them. Specimens of the contracts are attached to the complaint as Exhibits A and B (R. 14-19). The complaint alleges (R. 8, 9):

> "That the prices fixed and established by plaintiff, Sales Builders, Inc., in said contracts are fair and reasonable, and no higher than is required to yield to distributors at wholesale and retail a reasonable compensation for their services. That the goods sold by plaintiff, Sales Builders, Inc., are commodities within the terms of the 'Fair Trade Act' and bear the trade-marks, brands or names of the said plaintiff Max Factor & Co., as hereinbefore set forth, and are in fair and open competition with commodities of the same general class produced by others."

The complaint further alleges (R. 9) that practically

all of the wholesale druggists in the State of California have executed the wholesale contracts and that practically all of the retail druggists in the State of California have executed the retail contracts and that included among the retailers are the prominent department stores dealing in cosmetics and toilet articles;

> "That the said wholesale and retail druggists are observing and conforming with the terms of the said contracts and price cutting on plaintiff, Max Factor & Co., products has ceased, and, except as hereinafter stated, plaintiff, Sales Builders, Inc., is now enjoying, under the terms of the 'California Fair Trade Act,' a reasonable profit in the sale of its goods and immunity from destructive and uneconomic price cutting, the distribution of its goods has been unobstructed, and its business has been greatly benefited. That the wholesale and retail dealers in said commodities, by reason of such contracts, are obtaining a reasonable compensation and profit on the sale of preparations distributed by plaintiff, Sales Builders, Inc., and they and plaintiff, Sales Builders, Inc., have enjoyed and are continuing to enjoy freedom from price cutting and unfair competition, except as hereinafter set forth."

The complaint then alleges that plaintiff Sales Builders, Inc., has refused and will refuse to sell Factor products to any and all wholesalers and retailers who have not entered into the contracts referred to (R. 9).

The complaint continues (R. 10):

> "That defendants, before the inauguration of the method of doing business by the contracts hereinbefore described, were retail distributors of plaintiffs' goods and made a pretense of selling such goods at prices conspicuously lower than other retail dealers in the state of California, in

> many instances at less than the cost of said commodities, to defendants, with the result that other dealers were forced to meet defendants' price competition by offering plaintiffs' goods for sale at prices competitive with those quoted by defendants."

Upon the adoption of plaintiffs' system of contracts, a contract (Exhibit B) was tendered to the defendants and an opportunity given them to deal in the plaintiffs' goods on the same terms offered to every other retail druggist in the State of California; that defendants declined to execute said contracts or to conform to the system of distribution adopted by plaintiff or to observe the prices fixed in the contracts; that since the establishment by the plaintiff of its system of contracts, the defendants have repeatedly been requested to enter into a retail contract with the plaintiff but defendants have repeatedly refused to do so; that upon defendants' refusal to enter into such contracts plaintiff has declined and has continued to decline to sell its products to the defendants unless and until they enter into a contract (R. 10).

When plaintiff declined to sell its commodities to the defendants except as aforesaid, defendants, who had full knowledge of the system of contracts adopted by the plaintiffs and of the fact that substantially all wholesale and retail dealers in the State of California had executed such contracts and were operating in conformity with its terms,

> "conceived a wrongful and unlawful plan and scheme of harming, injuring and destroying plaintiff, Sales Builders, Inc.'s, said business and good will in the state of California by disrupting said system of lawful contracts existing between said plaintiff, Sales Builders, Inc., on the one hand, and its wholesale and retail distributors on the

other. That defendants have proceeded and are proceeding to carry out said unlawful and wrongful scheme and plan in the manner more particularly hereinafter set out, and in so doing have been and now are acting maliciously and without legal justification therefor." (R. 10, 11.)

The complaint then alleges that in pursuance and as a part of said unlawful and wrongful plan or scheme, defendants have procured and now procure Factor commodities bearing its trade marks, brands and names, unbeknown (*sic*) to the plaintiffs and have continually sold and are now selling them at prices less than the retail prices described in the retail contract and which prices are observed by substantially all the retail dealers in cosmetics and toilet articles in the State of California; that the defendants' prices are 69 cents for $1.00 items, 43 cents for 50 cent items and 29 cents for 50 cent items, the resale price of which, as set forth in the contracts, is $1.00 and 50 cents, respectively, and prices for other items are at a proportionate reduction.

The complaint asserts:

"That the plaintiff, Sales Builders, Inc., is informed and believes and therefore alleges that the cost to defendants of the said plaintiff, Max Factor & Co. products so sold by the said defendants is greater than the cost to the said defendants would be under a contract with the plaintiff, Sales Builders, Inc., as aforesaid." (R. 11).

It is alleged that defendants are engaged in informing retail dealers under contract with plaintiff, as well as the public generally of their intention to sell plaintiff's goods at the aforesaid cut rates (R. 11). Formal written notice was received by the defendants on August 25, 1933, that the plaintiff was operating its system of business under the terms of the Fair Trade

Act and a contract was tendered to the defendants (R. 12, 20). Since receipt of this notice, defendants have continued to cut prices to 69 cents for $1.00 items, 43 and 29 cents for 50 cent items (R. 13).

The injury to the plaintiffs by the defendants' conduct is set out in the complaint (R. 12) as follows:

> "That the said acts of the defendants hereinbefore alleged are unlawful and unduly influencing the retail and wholesale distributors of plaintiff, Max Factor & Co., products, and the said wholesale and retail distributors have complained that they will be compelled to cancel the contracts with plaintiff, Sales Builders, Inc., hereinabove referred to, and to sell the said Max Factor products not in conformity with the terms of said contracts, but at prices which will meet those announced by the said defendants, and at which prices the said defendants sell at retail the said plaintiff, Max Factor & Co., products, the result of which will be a destruction of plaintiffs' businesses and the good will pertaining thereto. That unless the relief herein prayed for is granted the plaintiffs the said cancellations by the said wholesale and retail distributors will take place, and a large number, if not all of the lawful contracts of plaintiff, Sales Builders, Inc., will be cancelled by the said wholesale and retail distributors, who are now parties to the said contracts, and the destructive price cutting in force before said contracts were entered into will be resumed with the result that destructive and predatory price cutting of plaintiff, Max Factor & Co., products will then prevail, distribution of said goods will be obstructed, and plaintiffs' businesses and the good will pertaining thereto will be injured, if not wholly destroyed, and in addition thereto the wholesale and retail distributors will be prevented from obtaining and earning a reasonable profit in the sale and distribution of the said plaintiff, Max Factor & Co., products."

The relief asked (R. 14) is that defendants be enjoined from selling, advertising or offering for sale any of the commodities distributed by the plaintiff in the State of California or any commodity bearing any of the trade marks, brands or names of the plaintiff Max Factor & Co., at prices less than the resale prices prescribed in the contract (Exhibit B) or, in the alternative, that the defendants be restrained and enjoined from selling any of the commodities and from advertising and offering any of such commodities for sale. There is also a prayer for general relief.

It is apparent from the foregoing facts which the general demurrer admits, that the plaintiffs are conducting their business in California under a system of contracts expressly authorized by the statutes of that State, that these contracts have been entered into with substantially all dealers in the State of California, that defendants, with full knowledge, and despite plaintiffs' protests, have purposely and without legal justification interfered with this lawful system of doing business and that their interference will destroy it by forcing parties to the plaintiffs' contracts to cancel them, thus obstructing the distribution of plaintiffs' goods and injuring plaintiffs' good will.

II.

Summary of Argument.

As enacted in 1931, the California Fair Trade Act permits contracts which stipulate resale prices provided that: (1) Such contracts relate to commodities identified by trademarks, brands or names; (2) such commodities are in fair and open competition with commodities of the same general class produced by others; and (3) such contracts are not made between competitors. This was no more than a codification of the existing common law of the state.

The only question before this Court is whether the 1933 amendment, Section 1½, as applied to the facts in this case, violates the Fourteenth Amendment of the Federal Constitution. Defendant's claim that it does, proceeds from a misconception of the nature and purpose of the statute. Section 1½ simply confers jurisdiction upon the civil courts of the state to provide relief against acts which damage property rights in trademarks and undermine lawful contracts.

Trademarks owe their existence to state law. Section 1½ protects the owners of trademarks against practices which may impair if not destroy them. It is a valid exercise of the power of the California legislature in securing and protecting property rights in intangibles which the law of California created.

Section 1½ is also a specification of acts of unfair competition, essentially a subject of state control.

It is also within the power of a state legislature to protect contract rights. Section 1½ by permitting relief against intentional interference with rights de-

rived from the lawful contracts provided by other sections of the Fair Trade Act is a valid exercise of state power.

The section, which defendant assails as depriving him of liberty and property without due process, is not regulatory. It does no more than to declare that acts knowingly done, which result in damage, shall be actionable in a civil proceeding.

The validity of Section 1½ is indicated by its integration with the common law doctrine which makes actionable third-party interference with contract relations, by its analogy to equitable servitudes and by its consistency with the development of the common law of unfair competition.

Tested in the light of these considerations and supported by the presumption of constitutionality particularly applicable to statutes dealing with matters of economic policy, Section 1½ is reasonable and has a substantial relation to the end sought by the California legislature. It does not, therefore, violate any provision of the Fourteenth Amendment to the Constitution of the United States.

III.

ARGUMENT.

(1) Price maintenance contracts of the character before the court in this case are valid under both the statutory and common law of the State of California.

The first expression by the Supreme Court of California as to the validity of contracts stipulating the prices at which the buyer should resell was in *Grogan* v. *Chaffee,* 156 Cal. 611, 105 Pac. 745, decided in 1909. In that case, the manufacturer of a pure olive oil had sold quantities of the product to a retail grocer pursuant to a contract by which the latter agreed to resell at specified prices. The olive oil was identified by copyrighted designs placed on every bottle and package. Reversing the action of the trial court, which had sustained a demurrer without leave to amend, the California Supreme Court declared:

> "In support of the ruling sustaining the demurrer it is urged that the contract relied on by plaintiff is unenforceable as being in restraint of trade.
>
> "We have here no question of an attempted monopoly. 'A monopoly exists where all, or so nearly all, of an article of trade or commerce within a community or district, is brought within the hands of one man or set of men, as to practically bring the handling or production of the commodity or thing within such control to the exclusion of competition of free traffic therein.' *Herriman* v. *Menzies,* 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81. * * * The contract here relied on does not relate to any olive oil except that manufactured by plaintiff. There is no suggestion that this comprises all, or any large proportion, of the olive oil manufactured or sold in the

market supplied by plaintiff. While plaintiff alleges that he manufactures oil by a process of his own discovery, there is nothing exclusive in the product resulting from this process. All that he claims for his oil is that it is pure and wholesome. The court must assume, as a matter of common knowledge, that others may and do manufacture pure olive oil in considerable quantities.

"Under these circumstances we see no reason why the contract alleged by plaintiff should not, as between the parties to it, be held to be valid. It violates no canon of public policy. By its terms the buyer is not precluded from engaging in any lawful trade. He may sell other olive oil at any price and on any conditions satisfactory to him. The producer was, in the first instance, under no obligation to sell his oil, and when he did sell it had the right to exact, as part of the consideration for the sale, a promise by the purchaser that he would not sell it at less than a stipulated price. There is nothing either unreasonable or unlawful in the effort by a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his products may have attained."

Three years later, the California Supreme Court reached the same conclusion in *D. Ghirardelli Co.* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041, involving a slightly different set of facts. The defendants in this case had purchased Ghirardelli's Ground Chocolate from a wholesale dealer, with whom the defendants had agreed to maintain resale prices specified by the manufacturer. In sustaining an injunction decreed by the trial court, the California Supreme Court held that the agreement between the wholesaler and retailer might properly be construed as one made for the benefit of a third person, the plaintiff manufacturer. The court also decided that

the contract was not in violation of the state anti-trust law as amended subsequent to the Grogan case.

The California Fair Trade Act, as passed in 1931, was held by the Court below to be merely a restatement of the rule of the Grogan and Ghirardelli cases (R. 38).

> "Another important factor that must be kept in mind is that in so far as the Fair Trade Act permits the producer to fix the resale price of his product by contract, the act merely embodies a rule of law well settled in this state. In *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745, and in *D. Ghirardelli Co.* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041, it was held that as far as articles in intrastate commerce are concerned, without statutory authorization the manufacturer, by contract with a retailer, may fix the resale price. The Fair Trade Act as passed in 1931 merely codifies the rule of those cases, which was partially changed by the Cartwright Act * * *."

The California Fair Trade Act is limited to trade marked goods sold in free competition with other goods[4] of the same class; it does not embrace bulk commodities. Contracts between producers and between distributors are not allowed. There cannot be any horizontal contracts. They must be vertical from the pro-

[4] This court has taken notice of the difference between branded and unbranded commodities. In *Borden's Farm Products Co., Inc.* v. *Ten Eyck*, 297 U. S. 251 (Feb. 10, 1936), the court permitted a price differential under the New York Milk Control Law in favor of milk dealers not having a "well-advertised trade name." In *Sugar Institute* v. *U. S.*, 297 U. S. 553, 600, passing upon phases of price-fixing and restraint of trade relating to sugar, the court said:

> "Another outstanding fact is that defendants' product is a thoroughly standardized commodity. In their competition price, rather than brand, is generally the vital consideration."

ducer down, not among producers, not among wholesalers, not among retailers.

The act does not fix prices or require that prices be fixed. It does not regulate anything or anybody. It is permissive only. It allows a single producer, if he chooses to do so, to make contracts with distributors of goods identified as coming from him, if they wish to enter into such contracts with him, establishing, on the producer's identified merchandise, minimum resale prices, to the end that the producer may protect his distribution by insuring a profit to his distributors and safeguard his good will by keeping his merchandise from deceptive use such as "loss leader" and "bait selling" and thus cheapening it in public estimation.

The California Fair Trade Act embodies the idea that such "loss leader" or "bait" selling is a bad thing. While a particular loss leader or bait item may be a bargain, the ordinary customer does not benefit by it because the price cutter knows the frailties of human nature. His primary purpose is to get customers into the store by advertising well-known articles of recognized value at "bargain prices." He knows that a customer lured into his store in pursuit of a spectacular bargain will probably yield to the blandishments of a high-powered salesman and be persuaded to buy something in addition to the bargain, or instead of the bargain, to accept something "just as good." The cutter will gladly lose five cents profit on a tube of Ipana tooth paste, if he can sell for thirty-five cents a tooth brush of an unknown make worth ten. The only way the consumer can benefit by these "bargains" is to buy them and *buy nothing else*. Few people are resolute enough to do this. They are persuaded by the obvious bargain price on the leader, into the belief that other things whose values are not known, are equally cheap.

Here is where the price cutter comes out ahead. In pricing unknown goods high, he recoups the sacrifice in selling known goods low. The fact that cut rate stores exist is proof that they make money.

The whole situation recalls Mr. Justice McKenna's observations in *Rast* v. *Van Deman & Lewis Company*, 240 U. S. 342, 365, which was a suit brought to restrain the enforcement of a Florida statute imposing special license taxes on merchants using profit-sharing coupons and trading stamps. He said:

> "The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a 'lottery,' may not be called 'gaming'; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry, a matter of inquiry and of judgment that it is finally within the power of the legislature to make. Certainly in the first instance, and, as we have seen, its judgment is not impeached by urging against it a difference of opinion."

The economic policy of authorizing contracts establishing minimum resale prices of goods identified by trade marks, made and sold in open competition with other goods of the same class, has been much debated. There are widely differing views. It is primarily an economic question. The State of California has taken the position that unrestrained price competition in identified merchandise and "bait" and "leader" selling are not desirable. It has decided that the way to prevent what is described as "injurious and uneconomic practices," is by permitting contracts to be

made fixing minimum resale prices[5] and to protect these contracts by making interference with their operation civilly actionable if it results in damage.

There is nothing novel in this policy. Contracts establishing resale prices were valid in California and elsewhere before the enactment of the so-called fair trade acts—in California,[6] in England,[7] and in several states.[8] Indeed, as far as this case is concerned, defendant does not question the validity of the contracts but assails only Section 1½ of the act, which gives a right of action to anyone who may be damaged by interference with them.

There are strong intimations by this court that national legislation authorizing price maintenance contracts would be valid. In *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, 25, Chief Justice White said:

> "Moreover, so far as the argument proceeds upon the assumption of the grave disaster which must come to the holders of patent rights and arti-

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[5] In an appendix to this brief is a discussion of the historical and economic aspects of this question.

[6] *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745 (1909); *D. Ghirardelli Co.* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041 (1912).

[7] *Palmolive Co., Ltd.* v. *Freedman*, (1928) 1 Ch. 264, 76 U. of Pa. Law Review 1006; *Elliman, Sons & Co. Ltd.* v. *Carrington & Son, Ltd.* (1901) 2 Ch. 275.

[8] *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144 (1913); *Clark* v. *Frank*, 17 Mo. App. 602 (1885); *Garst* v. *Harris*, 177 Mass. 72, 58 N. E. 174 (1900); *Garst* v. *Charles*, 187 Mass. 144, 72 N. E. 839 (1905); *Marsich* v. *Eastman Kodak Co.*, 244 App. Div. 295, 279 N. Y. Supp. 140 (2d Dept. 1935), aff'd per curiam, 200 N. E. 27; *Seagram* v. *Old Dearborn*, 363 Ill. 610, 2 N. E. (2) 940.

The Court of Appeals of New York in *Doubleday Doran* v. *Macy*, 269 N. Y. 272, 199 N. E. 409, sustained the validity of all sections of the corresponding New York Statute except the counterpart of Section 1½ of the California Act.

cles made under them from the future application of the doctrine which the cases establish, it must be apparent that if the forebodings are real the remedy for them is to be found, not in an attempt judicially to correct doctrines which by reiterated decisions have become conclusively fixed, but in invoking the curative power of legislation."

Mr. Justice Brandeis concurring said (27):

"Whether a producer of goods should be permitted to fix by contract, express or implied, the price at which the purchaser may resell them, and if so, under what conditions, is an economic question. To decide it wisely it is necessary to consider the relevant facts, industrial and commercial, rather than established legal principles. On that question I have expressed elsewhere views which differ apparently from those entertained by a majority of my brethren. I concur, however, in the answers given herein to all the questions certified; because I consider that the series of cases referred to in the opinion settles the law for this court. If the rule so declared is believed to be harmful in its operation, the remedy may be found, as it has been sought, through application to the Congress or relief may possibly be given by the Federal Trade Commission which has also been applied to."

In *Dr. Miles Medical Co.* v. *Park,* 220 U. S. 373, 405, there is a similar intimation that the right to establish resale prices can be given by statute. Mr. Justice Hughes saying:

"Nor can the manufacturer by rule and notice, *in the absence of contract or statutory right,* even though the restriction be known to purchasers, fix prices for future sales." (Emphasis ours.)

See also the observations of Mr. Justice Brandeis in *International News Service* v. *Associated Press,* 248

U. S. 215, 262. His conclusion was that the legislature is better fitted to meet such problems than the courts.

The State of California adopted this course in enacting the statute here involved, authorizing the establishment of resale prices within that state. There can be no doubt of its competency in this respect. If contracts such as this legislation authorizes may be declared illegal (and Federal and many State anti-trust laws so declare them) it seems irrational to say that they cannot be declared legal. Public policy is not an unvarying thing. As public policy changed, the old statutes against engrossing and forestalling were repealed "upon the express ground that the prohibited acts had come to be considered as favorable to the development of and not in restraint of trade."[9] In short as economic conditions change, ideas of public policy change.[10] The public policy of California as expressed in this statute did not change the law as it previously existed in that State but even if it did, a state may freely alter, amend or abolish the common law within its jurisdiction. *B. & O. Railroad* v. *Baugh,* 149 U. S. 368, 378: "There is no question as to the power of the States to legislate and change the rules of the common law * * *."

In *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Association,* 276 U. S. 71, 89, Mr. Justice McReynolds said:

> "Section one presents no Federal question. It does not mention the Constitution or any statute of the United States, but claims that the Association is an unlawful trust or combination under common law rules. But the present controversy

[9] *Standard Oil Co.* v. *U. S.,* 221 U. S. 1, 55.

[10] Id. 58, 59.

concerns a statute and a State may freely alter, amend or abolish the common law within its jurisdiction.

* * *

"Certainly the statute impaired no right of the Warehouse Company guaranteed by the Fourteenth Amendment by merely authorizing corporations with membership limited to agriculturists and permitting contracts for purchase and resale of farm products. This also is true of the declaration that such associations shall not be deemed monopolies, combinations or conspiracies in restraint of trade, and that contracts with members shall not be illegal. The state may declare its own policy as to such matters."

(2) Section 1½ of the California Fair Trade Act does not deprive any one of liberty or property without due process.

Coming now to the validity of Section 1½ which is the only question, as it seems to us, that this court is called upon to decide; this Section reads as follows:

"Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

(a) **Section 1½ is a proper protection to trade marks and within the power of the state to enact to secure to the owners within the state their trade mark property. Trade marks are an intangible right independent of the property in the physical things to which they are affixed and owe their existence to state law.**

The purpose of the act as expressed in its title is to "protect trade mark owners * * * against injurious and uneconomic practices, etc." A trade mark is an intangible property right which the owner does not part with when he sells goods to which the mark may be affixed. As this court said in *Bourjois* v. *Katzel,* 260 U. S. 689, 692, "Ownership of the goods does not carry the right to sell them with a specific mark."

Trade mark protection is peculiarly within the province of the several States since the right to a trade mark itself is entirely dependent on state law. Trade marks owe their very existence to the laws of the states. This proposition has been well established for many years. In *Trade-Mark Cases,* 100 U. S. 82, Mr. Justice Miller said (93):

> "* * * the property in trade-marks and the right to their exclusive use rest on the laws of the States, and, like the great body of the rights of person and of property, depend on them for security and protection * * *."

In *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 403, 424, Mr. Justice Holmes said:

> "But I think it necessary to go farther even on the assumption that we are dealing with the question of trade-marks in the several States only so far as commerce among the States is not concerned. The question before us, on that assumption, is a question of state law, since the rights that we are considering are conferred by the sovereignty of the State in which they are ac-

quired. This seems to be too obvious to need the citation of authority, but it is a necessary corollary of the *Trade Mark Cases,* 100 U. S. 82. Those cases decided that Congress cannot deal with trade-marks as used in commerce wholly between citizens of the same State. It follows that the States can deal with them, as in fact they sometimes do by statute, Mass. Rev. Laws, c. 72, §§ 2, 3, and when not by statute by their common law."[11]

[11] There have been statutes to protect trade marks in the several states for many years. In 1845 such a law was enacted in New York. State laws under different titles but all for the protection of trade marks were passed in Pennsylvania and Connecticut in 1847, Massachusetts in 1850, Ohio in 1859, Iowa 1860, Michigan 1863, Oregon 1864, Nevada 1865, Kansas, Maine and Missouri, 1866. Beginning in 1890, as a result of a controversy over the blue label of the Cigar Makers' International Union (*Schneider* v. *Williams,* 44 N. J. Eq. 391), statutes were passed in a large number of the states, authorizing the registration in the Office of the Secretary of State of labels, trade marks, terms, designs, devices or forms of advertisement, making infringement a misdemeanor and providing civil remedies.

At present there are statutes protecting trade marks in the following forty-five states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and in the territories of Alaska and Hawaii.

Complete texts of these acts are in Hopkins on Trademarks, Tradenames and Unfair Competition (Fourth Edition, 1924), Part II, Section F, beginning on page 620, which was complete up to the date of publication. There is also an abstract of the trade mark statutes of the several states in Shoemaker's Trade Marks (1931) page 1028 and following.

Many state statutes declare that the use or display of the genuine trade mark in any manner not authorized by the owner is actionable.

In *United Drug Company* v. *Theodore* [illegible]*anus Company,* 248 U. S. 90, 99, Mr. Justice Pitne[illegible]d:

> "There was nothing to prevent the [illegible]te of Kentucky (saving, of course, what Cong[illegible] might do within the range of its authority) [illegible] conferring affirmative rights upon Recta[illegible] exclusive in that Commonwealth as aga[illegible] others whose use of the trade-mark there [illegible] at a later time than his; * * *"

If, as these cases hold, a state which c[illegible]s trade mark property may protect it against t[illegible]ong of imitation, why cannot the state equally [illegible]tect the trade mark owner against other acts whi[illegible]pair the value of his trade mark and may destroy [illegible] The sale of trade marked goods at cut prices is re[illegible]zed as an injurious practice. Persistent price [illegible]g is as destructive of trade mark property as [illegible]lesale infringement. It cheapens the goods in [illegible]c estimation and thus disparages the good will [illegible] the trade mark symbolizes.

The willingness of the public to pa[illegible]enchanced price for reputable identified goods is [illegible]of the advantages which results from the owner[illegible]f an established trade mark.

This was pointed out in *McLean* v[illegible]*ing,* 96 U. S. 245, 251, where Mr. Justice Clifford[illegible]rked that if a manufacturer

> "has obtained celebrity in his m[illegible]cture, he is entitled to all the advantages [illegible]t celebrity, whether resulting from the grea[illegible]mand for his goods or from the higher price [illegible]blic are willing to give for the article * * *"

It cannot be doubted that the le[illegible]re of a state has the power to pass laws to pr[illegible]e owners of trade marks or other property a[illegible]respasses, if the legislation adopted is reasona[illegible]signed to accomplish that end and is not arbit[illegible] Trade marks

are property. As Mr. Justice Holmes said in *Beech-Nut Packing Company* v. *P. Lorillard Company,* 273 U. S. 629, 632:

> "* * * in a qualified sense the mark is property, protected and alienable, although as with other property its outline is shown only by the law of torts, of which the right is a prophetic summary."

The legislation here involved merely defines and makes civilly actionable, conduct injurious to a property right which the law of California originally created.

Moreover, a trade mark is property of a peculiar, intangible sort. Its value depends upon acceptance by a fickle consuming public, it is difficult to build up and easy to injure, as Mr. Justice Holmes said in *Bourjois* v. *Katzel,* 260 U. S. 689, 692:

> "It deals with a delicate matter that may be of great value but that easily is destroyed, and therefore should be protected with corresponding care."

The protection of trade marks has always been regarded as sound public policy. Mr. Justice Clifford said in *McLean* v. *Fleming,* 96 U. S. 245, 252:

> "Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good-will of his trade, and in the labels or trade-mark which he adopts to enlarge and perpetuate it. Hence it is held that he, as proprietor, is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority."

The nature of a trade mark is such that its owner cannot keep it in possession but must constantly pass it through the hands of many dealers to millions of

consumers. But the warranty of reliability which the trade mark implies is the warranty of the trade mark owner. "It stakes the reputation of the plaintiff upon the character of the goods." (*Bourjois* v. *Katzel,* 260 U. S. 689, 692.) When the owner of the trade mark passes goods bearing it through trade channels to the public, he never loses title to the mark even though he sells the commodity to which it is applied. A buyer of goods bearing a trade mark, therefore, is not the owner of the trade mark although he may own the goods.[12] It would seem to follow that state legislation dealing with the treatment which must be given a trade mark by one who is not the owner of the trade mark, does not deprive such person of his property because he has no ownership in it.

Similar problems were involved in the legislation in most of the states forbidding or regulating the re-use of bottles or other containers bearing the trade mark of the person who originally filled the bottle.[12a]

As was recognized by Mr. Chief Justice Taft in *American Steel Foundries* v. *Robertson,* 262 U. S. 209, the rights of an owner of a Federally registered trade-mark are analogous to the rights of the owners of patents and copyrights. The distinction between the property right in a copyright and the property rights in the work or publication protected by the copyright is well recognized.

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[12] "In the very nature of the case, as it seems to me, the trademark must be something other than, and separate from, the merchandise." (*Davis* v. *Davis,* 27 Fed. 490, 492.)

[12a] For example, see *People* v. *Cannon,* 139 N. Y. 32.

People v. *Luhrs,* 195 N. Y. 377; *Hostetter* v. *Goerling,* 173 N. Y. Supp. 375, 9 T. M. R. 65.

In *Stevens* v. *Gladding,* 17 How. 447, 452 (57-58 U. S. 470, 475), this court said:

> "And upon this question of the annexation of the copyright to the plate it is to be observed, first, that there is no necessary connection between them. They are distinct subjects of property, each capable of existing, and being owned and transferred, independent of the other. It was lawful for anyone to make, own, and sell this copper plate. The manufacture of stereotype plates is an established business, and the ownership of the plates of a book under copyright may be, and doubtless in practice is, separated from the ownership of the copyright. If an execution against a stereotype founder were levied on such plates, which he had made for an author and not delivered, the title to those plates would be passed by the execution sale, and the purchaser might sell them, but clearly he could not print and publish the book for which they were made. The right to print and publish is therefore not necessarily annexed to the plate, nor parcel of it."

To the same effect is *Stephens* v. *Cady,* 14 How. 528, 531 (55-56 U. S. 565, 568), in which the court said:

> "But the property in the copy-right is regarded as a different and distinct right, wholly detached from the manuscript, or any other physical existence, and will not pass with the manuscript unless included by express words in the transfer."

See also *Henry Bill Publishing Co.* v. *Smythe,* 27 Fed. 914, especially at 922, where the court said:

> "Certainly, congress may prohibit any owner of the paper, twine, and leather called a 'book' from selling, using, or enjoying, even by reading, if congress choose, the printed words used to express the ideas therein, until the author has received his compensation in money for his labor in producing those ideas. The only question is the extent to which congress has gone in the legislation under

> consideration. The purchaser of the paper, leather, and twine does not necessarily purchase the literary property, and he *cannot use his ownership of the one to defraud the author of his property in the other. This case illustrates the necessity for maintaining that distinction.*" (Italics ours.)

It will be observed that the purpose of the California statute under discussion here is to prevent a store keeper from intentionally using what he owns (the commodity itself) to injure a third person in his property in the trade mark which the store keeper does not own, and if the legislation be reasonable, it is not objectionable.

The price cutter uses a trade mark which he does not own as bait to catch customers to sell them other goods on which he makes a profit. A trade mark is visible reputation and the reputation the price cutter uses to get people into his store does not belong to him but belongs to the owner of the trade mark. Thus the price cutter appropriates for an ulterior purpose a reputation not his own. The situation is not different in its essentials from that in *International News Service* v. *Associated Press,* 248 U. S. 215, 240, and as mentioned by the Chief Justice in *Schechter* v. *U. S.,* 295 U. S. 495, 532, where, in speaking of unfair competition, he said "In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation * * *."

(b) **Section 1½ is valid as a specification of acts constituting unfair competition.**

In order to see Section 1½ in proper perspective in this aspect of the discussion, it is desirable briefly to trace the history of the idea of unfair competition from the first use of the phrase.

The injury resulting from the imitation of a trader's identifying mark was the sale of a competitor's goods as those of the original user and hence to interfere with his trade expectancy or "good will" by depriving him of customers by misrepresentation. The notion of property in trade marks was thus developed and for a while it served well enough but it was very soon perceived that a trader's customers might be diverted by the imitation of elements which were not trade marks and in which property rights could not be maintained, such as simulation of packages, the misuse of personal names, descriptive words and the like. The result was the same misrepresentation and the same interference with trade expectancy. At first the courts had difficulty in adjusting themselves to the situation. Law writers did not know where to classify these cases. Digest compilers put them under an added paragraph heading "Cases analogous to trade mark cases." A chapter similarly entitled was tacked on to text books. Mr. Browne in the first edition of his book on Trade Marks (Boston, Little, Brown & Co., 1873) had a chapter (XII) "Rights analogous to those of Trade Marks." The phrase unfair competition was not used. In the second edition (1885) the same chapter heading is used but the phrase "unfair competition" appears in the index and in Section 43 it is said:

> "*Unfair competition in Business.*—In examining cases classified in digests and books of reports as those of trade-marks, the reader is sometimes puzzled. In the absence of the slightest evidence that technical trade-marks have been infringed, courts of equity have granted full and complete redress for an improper use of labels, wrappers, bill-heads, signs, or other things that are essentially *publici juris.* The difficulty is, that wrong names are used. French-speaking nations have a

> standard name for this kind of wrong. The term used is *concurrence deloyale*. This term may fairly be Anglicized as a dishonest, treacherous, perfidious rivalry in trade. In the German Imperial Court of Colmar, in 1873, the court said that current jurisprudence understands by *concurrence deloyale* all manoeuvres that cause prejudice to the name of a property, to the renown of a merchandise, or in lessening the custom due to rivals in business. The euphemism employed as a head to this section will answer the present purpose."

The phrase unfair competition soon became applied exclusively to cases involving passing off and the law itself was in danger of being crystallized by the supposed limitations of the term. Happily, unfair competition soon became applied to conduct which did not involve passing off and was extended to include misappropriation as well as misrepresentation,[13] and in general to conduct which artifically and injuriously interferes with the normal course of trade (*International News Service* v. *Associated Press,* 248 U. S. 215, 240). Thus, disparagement,[14] molestation,[15] inducing breach of contract,[16] commercial bribery,[17] misleading advertising,[17] false trade descriptions,[17] misrepresentation of

[13] *International News Service* v. *Associated Press,* 248 U. S 215, 241, 242; *Schechter* v. *United States,* 295 U. S. 495, 532.

[14] Smith, Disparagement of Property, 1913, 13 Col. Law Rev. 13; Pound, Equitable Relief Against Defamation, 1916, 29 Harvard Law Review, 640, 668.

[15] *Evenson* v. *Spaulding,* 150 Fed. 517.

[16] Sayre, Inducing Breach of Contract, 1923, 36 Harvard Law Review 663; Carpenter, Interference with Contract Relations, 41 Harvard Law Review 728.

[17] *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483; *Federal Trade Commission* v. *Algoma Lumber Co.,* 291 U. S. 67.

business status,[18] use of lotteries as a sales stimulant,[19] all illustrate only a few instances which show how the phrase unfair competition or unfair methods of competition has expanded from its small beginnings to its present scope.[20] Indeed the French, to whom we owe the phrase unfair competition, recognize injurious price cutting as a variety of it,[21] and this Court has spoken of "unfair methods of competition such as local price cutting."[22]

The applicability of this development to the present discussion is, we think, obvious. Section 1½ in reality has nothing to do with *price fixing*. It makes actionable, injurious *price cutting*. In this case it is the price cutting dealer who fixes the price of the trade marked goods in the market in which he operates, because with respect to indentified merchandise, the lowest price *is* the market price. Thus it is the defendant in this case who is claiming the constitutional right to fix the price at which Factor goods shall be sold in Beverly Hills.

Mr. Justice Pitney said in *International News Service* v. *Associated Press*, 248 U. S. 215, 236:

> "Obviously, the question of what is unfair competition in business must be determined with par-

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[18] *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212.

[19] *Federal Trade Commission* v. *Keppel & Bro:*, 291 U. S. 304.

[20] See article "Unfair Competition" by Milton Handler, 21 Iowa Law Review 175, January, 1936.

[21] See Pouillet, Traite des Marques de Fabrique, Par. 1221:

> "No doubt that on principle, and in the absence of an agreement to the contrary, a retailer has the right to sell at a price that suits him, even at a loss, articles which he buys for his trade. That is one of the evident consequences of the principle of freedom of trade. Nevertheless, the rule is far from being without exceptions. Sale at a cut price may take place under such conditions, with so evident an intention to depreciate the merchandise, that it becomes an act of unfair competition."

[22] *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 43.

> ticular reference to the character and circumstances of the business. The question here is not so much the rights of either party as against the public but their rights as between themselves."

Price cutting as a variety of unfair competition is probably actionable at common law.[23] Certainly a state can make it so by statute.

By such statutes as this, the state merely opens its courts to the injured party by giving him an opportunity to recover such damages as he can prove that he suffered from an injurious act. No penalty is provided; nothing is forbidden; a civil suit is authorized, no more.

No one is deprived of liberty or property merely because he is made liable to a civil suit. It has been held repeatedly by this court that states without depriving anyone of his constitutional rights, may create a civil liability where none existed before, take away defenses and in general may determine for themselves what shall be actionable.

In *St. Louis and S. F. Railway* v. *Mathews*, 165 U. S. 1, 27, the court said:

> "The statute is not a penal one, imposing punishment for a violation of law; but it is purely remedial, making the party, doing a lawful act for its own profit, liable in damages to the innocent party injured thereby, and giving to that party the whole damages, measured by the injury suffered."

In *Chicago and Alton Railroad Co.* v. *Tranbarger*, 238 U. S. 67, 76, which involved a Missouri statute compelling surface water outlets, Mr. Justice Pitney said:

> "The previous immunity from responsibility for such injury was nothing more than a general

[23] *Tuttle* v. *Buck*, 107 Minn. 145, 119 N. W. 946; *Boggs* v. *Duncan Shell Furniture Co.*, 163 Iowa 106, 143 N. W. 483; *Dunshee* v. *Standard Oil Co.*, 152 Iowa 618, aff'd. 165 Iowa 625, 132 N. W. 371.

rule of law, which was not in terms or by necessary intendment imported into the contract. For just as no person has a vested right in any general rule of law or policy or legislation entitling him to insist that it shall remain unchanged for his benefit * * * so an immunity from a change of the general rules of law will not ordinarily be implied as an unexpressed term of an express contract * * *.

But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the State for the general benefit of the community at large and for the purpose of preventing unnecessary and wide-spread injury to property."

In *George* v. *Board of Revenue,* 207 Ala. 227, 92 South. 269, before the enactment of the statute in issue, the common law required that stock be "fenced out, not in." (*Clear Creek Lumber Co.* v. *Gossom,* 151 Ala. 450, 44 South. 404.) The stock law later required owners of cattle to fence them in or be liable for damages they caused. The Court in this case said;

"The decisions are to the effect that, should he exercise the right and permit his cattle to run at large, he nevertheless subjects himself to liability should they wander into a stock law district and commit depredations upon property of residents of such district."

Statutes making the seller of liquor liable civilly for all damages done by the purchaser are valid. In *Bertholf* v. *O'Reilly,* 74 N. Y. 509, 513, the Court said:

"The question we are now to determine is whether the Legislature has the power to create a cause of action for damages, in favor of a person injured in person or property by the act of an intoxicated person * * *."

This opinion contains a full and valuable discussion of police power and concludes that the legislation in question is but an extension by the legislature of the principle expressed in the maxim "*sic utere tuo*, etc." to cases to which it had not before been applied and that "the propriety of such an application is a legislative and not a judicial question." A similar case in this Court is *Eiger* v. *Garrity*, 246 U. S. 97.

A statute making one who excavates more than twelve feet, liable for damages to adjoining property, is constitutional. *Tillson* v. *Consumers' Power Co.*, 269 Mich. 53, 256 N. W. 801.

In *Kimmish* v. *Ball*, 129 U. S. 217, 222, this court said:

> "The case is, therefore, reduced to this, whether the State may not provide that whoever permits diseased cattle in his possession to run at large within its limits shall be liable for any damages caused by the spread of the disease occasioned thereby; and upon that we do not entertain the slightest doubt."

In *M. K. T. Railroad Co.* v. *Haber*, 169 U. S. 613, 625, there was under consideration a Kansas statute giving a right of action for damages caused anyone by another's transportation of diseased animals. This court upheld the statute saying:

> "It did nothing more than declare as a rule of civil liability in Kansas, that anyone driving, shipping or transporting * * * cattle liable to impart [disease] * * * should be responsible in damages to any persons injured thereby."

There is no doubt that the legislature of a state may create causes of action and the right to recover damages for acts which theretofore were not actionable. This statement is such a truism that to cite examples of

bulk sales laws, automobile speed limits, death actions, and the like, seems facetious. Indeed, the legislature may and often does subject persons to liability without fault. A few examples are workmen's compensation laws, *New York Central Railroad* v. *White*, 243 U. S. 188; the liability of railroads for fires caused by locomotives and for injuries to passengers, *Chicago Railroad Co.* v. *Zernecke*, 183 U. S. 582; of the driver of animals for injury to the highway, *Jones* v. *Brim*, 165 U. S. 180; of damage to municipalities done by mobs, *Chicago* v. *Sturges*, 222 U. S. 313;[24] of the owner of an automobile for injury caused by the automobile when driven by a third person.

The question which this court is called upon to decide is whether, under the economic situation existing in the State of California, that State has a right with respect to transactions entirely within its borders, to define acts which are unfair in fact to be unfair competition in law and to give access to the California courts to persons who may be damaged by them.

In *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Association*, 276 U. S. 71, the Bingham Act of the Kentucky legislature penalized anyone who knowingly induced a member of a co-operative marketing association to violate his contracts. It was argued that this provision was unconstitutional. Mr. Justice McReynolds said (Page 91):

> "Counsel maintain that the Bingham Act takes from the Warehouse Company the right to carry

[24] See Note on mob liability statutes 13 A. L. R. 754. See also 12 C. J. 1241 *et seq.* under heading "creation and enlargement of liability". See an article by Elmer Smead in 21 Cornell Quarterly 276 on "*sic utere tuo*, etc." as a basis of state police power. Many cases of statutory liability—absolute and regardless of fault are collected in a Note 53 A. L. R. 875.

on business in the usual way by accepting and selling the tobacco of those who voluntarily seek its services and thus unduly abridges its liberty. Undoubtedly the statute does prohibit and penalize action not theretofore so restricted and to that extent interferes with freedom. But this is done to protect certain contracts which the legislature deemed of great importance to the public and peculiarly subject to invasion. We need not determine whether the liberty protected by the Constitution includes the right to induce a breach of contract between others for the aggrandizement of the intermeddler—to violate the nice sense of right which honorable traders ought to observe."

(c) Section 1½ is valid because it does no more than to make a willful act civilly actionable by a person injured thereby.

This section declares that acts wilfully and knowingly done are actionable at the suit of any person damaged thereby.

As the Supreme Court of California suggested, this section is not solely a price fixing or regulating statute (R. 38). The Court observed:

> "The statute, in other words, does not merely prohibit price-cutting in order to regulate prices, but prohibits price-cutting in an attempt to protect the validly acquired rights of others."

Analysis of the language of Section 1½ will show the correctness of the Court's conclusion.

"Wilfully and knowingly" is a term well understood. These words have been defined by this court to mean, for a bad purpose, without justifiable excuse. (*Potter* v. *United States,* 155 U. S. 438, 446; *Spurr* v. *United States,* 174 U. S. 728, 734; *Felton* v. *United States,* 96 U. S. 699, 702).

The language "* * * at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act" may be paraphrased: "* * * at less than established prices" or "in violation of a lawful contract." Whether a person "is or is not a party to such contract" is the contested point.

A party to a contract, of course, is liable if he breaks it. No question is raised except as to the liability of one who is not a party. The invalidity is asserted to result from the two words "is not" and it is claimed that these bind a man to observe a contract he did not make and thus to deprive him of his property because it interferes with his right of free bargaining or making any contract he pleases.[25]

But the definition of a non-contracting party's liability is plain enough when the language of the act is considered in its legal meaning. He is a person who

[25] In *Chicago, Burlington and Quincy Railroad Company* v. *McGuire,* 219 U. S. 549, 564, Mr. Justice Hughes said:

"The first ground of attack is that the statute violates the Fourteenth Amendment by reason of the restraint it lays upon liberty of contract. This section of the Code of Iowa (§ 2071), as originally enacted, imposed liability upon railroad corporations for injuries to employes, although caused by the negligence or mismanagement of fellow-servants. And it was held by this court that it was clearly within the competency of the legislature to prescribe this measure of responsibility. *Minneapolis & St. Louis Railway Co.* v. *Herrick,* 127 U. S. 210, following *Missouri Railway Co.* v. *Mackey,* 127 U. S. 205."

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"But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses."

See also *Frisbie* v. *United States,* 157 U. S. 160, 165, 166.

knowing of a lawful contract, purposely interferes with its operation.[26] This the act calls "unfair competition," which is an epithet to characterize the preceding language (*Hurn* v. *Oursler,* 289 U. S. 238, 246). This unfair competition is made "actionable at the suit of any person damaged thereby." "Actionable" means ground for legal proceedings. "Damage" means "The compensation which the law will award for an injury done." (*Scott* v. *Donald,* 165 U. S. 58, 86.) Hence, "person damaged" means one hurt by a legal injury.

Naturally the California Fair Trade Act applies only to the State of California since state statutes have no extra-territorial force[27] and the state, in providing for a civil suit, must be presumed to have intended to confer jurisdiction upon its own courts. Therefore, to paraphrase Section 1½ it would read:

> "To advertise, offer for sale or sell any commodity identified by a trade mark, brand or name at less than the established price therefor when done for a bad purpose and without justifiable excuse is ground for a civil suit in the courts of California by any person who can show that he has suffered legal injury therefrom."

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[26] The demurrer admits the averment of the complaint that the defendant in this case acted maliciously (R. 11) and without legal justification. His acts resulted in threats of cancellation of their contracts by plaintiffs' customers (R. 12); thus damage is also admitted. Malice in this case is not only an admitted fact but is suggested by the circumstance that defendant could have obtained Factor goods from plaintiff at less than he actually paid for them (R. 11). On the factor of motive as a condition to liability compare *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1, with *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, and *State* v. *Bridgeman & Russell Co.,* 117 Minn. 186.

[27] *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 357.

The question in this aspect resolves itself thus and we should suppose that no one would seriously dispute the validity of such an act. It will be observed that nothing is prohibited. There is no penalty. There is no criminal liability. The act here assailed does no more than define a civil liability and provides that suit may be brought to recover, if one can show a legal injury, for acts which many courts, on common law principles, have long regarded as wrongful. The defendant is not deprived of any defense.[28] As the Court said in the *Arizona Employers' Liability Cases,* 250 U. S. 400, 426:

> "And it amounts to a contradiction of terms to say that in submitting a controversy between litigants to the established courts, there to be tried according to long-established modes and with a constitutional jury to determine the issues of fact and assess compensatory damages, there is a denial of 'due process of law.' "

Moreover, it is significant that the normal, and perhaps the only practical, remedy available for the enforcement of the Fair Trade Act is injunctive relief, as is sought in the present case. This being an equitable remedy, the court, as a court of equity, is vested with the broad and discretionary powers which characterize equity jurisdiction. The court is thus always at liberty to deny relief where particular circumstances make it inequitable to grant it.[29]

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[28] *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 501. *Omaechevarria* v. *Idaho,* 246 U. S. 343, 348.

[29] The distinction between law and equity has been abolished in California. There is but one form of civil action in which every defense, legal or equitable, is available (1 California Jurisprudence 312).

(d) The presumption of constitutionality is particularly applicable to the statute now before the court.

The attack on Section 1½ of the California Fair Trade Act is on the specific ground that it deprives defendant of his property and liberty without due process (R. 58, 59) because by making him liable to a civil suit by anyone to whom his acts cause legal damage, it interferes with his asserted right to sell plaintiffs' trade-marked goods at any price he pleases and regardless of consequences.

In every case where it is averred that the due process clause is violated, the question, it seems to us, is whether there has been a reasonable exercise of legislative power and whether the means adopted have a real and substantial relation to the end sought.

The end sought in the present act is expressed by its title, "to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name." The means adopted are to make one who knowingly sells trade-marked goods at less than the price established in lawful contracts, liable to a civil action, for unfair competition, at the suit of any person damaged.

The protection of trade-marks against injurious practices is within the province of the states since trade-marks have their origin in state laws. The end, therefore, of this legislation, *i. e.*, the protection of trade marks, is legitimate and within the power of the state. The constitutional question remaining is whether the means to attain the end are appropriate, adapted to attain it and are not prohibited.

The regulation of local business by the legislatures of the various states has been approved in countless cases. Numerous examples are in the margin.[30] These regulations have been for many different purposes, in-

[30] This court has held that a legislature may fix the charges the owners of grain warehouses and elevators may make. (*Munn* v. *Illinois* (1876), 94 U. S. 113; *Brass* v. *North Dakota* (1894), 153 U. S. 391; *Budd* v. *New York* (1892), 143 U. S. 517.)

Fix the charges insurance companies may make. (*German Alliance Ins. Co.* v. *Lewis* (1914), 233 U. S. 389.)

Limit agents' commissions on fire insurance policies. (*O'Gorman* v. *Hartford Insurance Co.* (1931), 282 U. S. 251.)

Require miners to be paid per ton of coal uncreened instead of screened. (*McLean* v. *Arkansas* (1909), 211 U. S. 539; *Rail & River Coal Co.* v. *Yaple* (1915), 236 U. S. 338.)

Require employers who pay their men in store orders to redeem them in cash. (*Knoxville Iron Co.* v. *Harbison* (1901), 183 U. S. 13; *Dayton Coal & Iron Co.* v. *Barton* (1901), 183 U. S. 23; *Keokee Cons. Coke Co.* v. *Taylor* (1914), 234 U. S. 224.)

Fix the fees chargeable by attorneys appearing for injured employees before Workmen's Compensation Commissions. (*Yeiser* v. *Dysart* (1925), 267 U. S. 540.)

Fix the rate of pay for overtime work. (*Bunting* v. *Oregon* (1917), 243 U. S. 426.)

Regulate attorneys' fees for preparing and prosecuting pension claims. (*Frisbie* v. *U. S.* (1895), 157 U. S. 160.)

Fix the time within which the services of employees must be paid for, and provide for semi-monthly payments of wages. (*Erie R. R. Co.* v. *Williams* (1914), 233 U. S. 685.)

Establish maximum hours of labor for men. (*Holden* v. *Hardy* (1898), 169 U. S. 366.)

Establish maximum hours of labor for women. (*Muller* v. *Oregon* (1908), 208 U. S. 412; *Miller* v. *Wilson* (1915), 236 U. S. 373.)

Prohibit the payment of wages in advance. (*Patterson* v. *Bark Eudora* (1902), 190 U. S. 169; *Strathearn Steamship Co.* v. *Dillon* (1920), 252 U. S. 348.)

Require that loaves of bread of only a certain size be sold. (*Schmidinger* v. *Chicago* (1913), 226 U. S. 578.)

Prohibit the sale of berries in any container except in those of prescribed dimensions. (*Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176 (Nov. 18, 1935).)

cluding the creation of new rights and liabilities and the destruction of existing ones.[31] Some are cited by the Court below (R. 35). Mr. Justice Stone mentions many in his opinion in *Tyson* v. *Banton,* 273 U. S. 418, 453, and Mr. Justice Roberts in *Nebbia* v. *New York,* 291 U. S. 502, 526, where laws to secure fair trade practices are included among the illustrations which have been found consistent with due process. On page 530 it is said:

> "The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price-cutting and reduced the income of the farmer below the

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Fix the maximum rate of interest chargeable on loans. (*Griffith* v. *Connecticut* (1910), 218 U. S. 563.)

Regulate sales of merchandise in bulk. (*Lemieux* v. *Young* (1909), 211 U. S. 489.)

Regulate the net weight of retail packages. (*Armour* v. *North Dakota* (1916), 240 U. S. 510.)

Declare void sales of commodities on margin or for future delivery. (*Booth* v. *Illinois* (1902), 184 U. S. 425; *Brodnax* v. *Missouri* (1911), 219 U. S. 285.)

Forbid unfair competition by the charging of lower prices in one locality than those exacted in another. (*Central Lumber Co.* v. *South Dakota* (1912), 226 U. S. 157.)

Forbid giving trade inducements to purchasers, by imposing a prohibitive tax on merchants giving such inducements. (*Rast* v. *Van Deman & L. Co.* (1916), 240 U. S. 342.)

Authorize a board to fix the retail price of milk. (*Nebbia* v. *New York,* 291 U. S. 502.)

Prohibit interference with cooperative marketing contracts. (*Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-operative Marketing Association,* 276 U. S. 71.)

Authorize the Secretary of Agriculture to fix charges made by marketing agencies in stockyards. (*Tagg Bros.* v. *U. S.* (1930), 280 U. S. 420.)

[31] Right of employee to recover for injury caused by a fellow servant, *Missouri Ry.* v. *Mackey,* 127 U. S. 205 (1888).

Absolute liability for fire caused by sparks from locomotives, *St. L. & S. F. Ry. Co.* v. *Mathews,* 165 U. S. 1 (1897).

cost of production. We do not understand the appellant to deny that in these circumstances the legislature might reasonably consider further regulation and control desirable for protection of the industry and the consuming public. That body believed conditions could be improved by preventing destructive price-cutting by stores which, due to the flood of surplus milk, were able to buy at much lower prices than the larger distributors and to sell without incurring the delivery costs of the latter."

Liability for fire caused by sparks from locomotives, plus liability for attorneys' fees, *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96 (1899).

Right to recover gambling losses from owner of premises used for gambling purposes, *Marvin* v. *Trout*, 199 U. S. 212 (1905).

Limitation of carrier's liability for injury to one not a passenger or employee, *Martin* v. *Pittsburgh & Lake Erie R. R.*, 203 U. S. 284 (1906).

Liability of mine owner for the wilful negligence of his managers and mine examiners, *Wilmington Mining Co.* v. *Fulton*, 205 U. S. 60 (1907).

Liability for non-delivery of messages regardless of contracts limiting such liability, *Western Union Tel. Co.* v. *Commercial Milling Co.*, 218 U. S. 406 (1910).

Right of employee to recover for the negligence of fellow servants regardless of contracts limiting his employer from such liability. *C. B. & Q. Ry.* v. *McGuire*, 219 U. S. 549 (1911).

Absolute liability of city for injury to property caused by mob violence, *City of Chicago* v. *Sturges*, 222 U. S. 313 (1911).

Liability to provide a drain for surface water, *Chicago & Alton* v. *Tranbarger*, 238 U. S. 67 (1915).

Right to recover compensation for injury regardless of fault or contributory negligence, *New York Central R. Co.* v. *White*, 243 U. S. 188 (1917); same, *Mountain Timber Co.* v. *Washington*, 243 U. S. 219 (1917); same, Arizona Employers' Liability Cases, 250 U. S. 400 (1919).

Right to recover punitive damages for negligent homicide, *Pizitz Dry Goods Co.* v. *Yeldell*, 274 U. S. 112 (1927).

Limitation of automobile owners' liability for injury to guest except when occasioned by willful and wanton negligence, *Silver* v. *Silver*, 280 U. S. 117 (1929).

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"The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago."

(e) The statute here in question is reasonable and desirable in its practical effect.

We think that, especially since the statute in this case relates to local business practices, great weight is to be given to the legislative determination of the need of legislation and that the discussion should start with the presumption that the legislature of California had reasonable grounds for its action.[32]

Statutes frequently wrestle with an economic problem, the solution of which is a matter of controversy. The wisdom of the statute is not the test of its constitutionality, nor is it within the cognizance of the court that passes upon its constitutionality.[33] All doubts

[32] 36 Columbia Law Review 283, "The Presumption of Constitutionality Reconsidered."

49 Harvard Law Review 631, "The Presentation of Facts Underlying the Constitutionality of Statutes."

38 Harvard Law Review 6, Biklé, "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action."

[33] Courts of last resort in California, Illinois, New York and New Jersey have passed upon the precise question now before this court. The Supreme Courts of California and Illinois (*Max Factor & Co.* v. *Kunsman*, R. 24, 5 Cal. (2) 446, 55 Pac. (2) 177; *Joseph Triner Corporation* v. *McNeil*, 363 Ill. 559, 2 N. E. (2) 929; *Seagram* v. *Old Dearborn*, 363 Ill. 610, 2 N. E. (2) 940, holding the statute constitutional, refused to follow the New York Court of Appeals decision that the statute was unconstitutional (*Doubleday*,

must be resolved in favor of the legislation. These principles are fundamental and have never been questioned.

> "But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail — principle or condition — cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that *each act of legislation has the support of the presumption that it is an exercise in the interest of the public.* The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. *The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance.*" (Italics added.) (*Erie Railroad Co.* v. *Williams,* 233 U. S. 685, at p. 699.)

> "Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." (*Nebbia* v. *New York,* 291 U. S. 502, 537.)

Constitutional law is not a static body of unchanging dogma; it is a moving, growing, dynamic force, using as its tools time-honored principles, but applying them with an understanding that is alive to new conditions

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Doran & Co., Inc. v. *R. H. Macy & Co., Inc.,* 269 N. Y. 272, 199 N. E. 409.) The Vice Chancellor in New Jersey came to the same conclusion as the New York Court of Appeals, *Johnson & Johnson* v. *Weisbard,* 120 N. J. Eq. 314, 184 Atl. 783.

and needs. That which a legislature may not prescribe at one time it may very properly prescribe at another time under changed circumstances. It has been discovered that there is a far greater inter-relationship between the conduct of private business, in its vast ramifications under modern conditions, and the general public welfare, than was previously supposed. It has likewise been perceived that unchecked competition is not necessarily consistent with public welfare. The scope of the interest of the state has necessarily grown, and the state may, by legislation, seek to protect that interest.

(f) Common law analogies.

(1) Section 1½ is an application of principles similar to those which underlie the doctrine of equitable servitudes.

Independently of any statute, the imposing of restrictions upon property by contract between buyer and seller, binding upon subsequent, noncontracting purchasers, is not a concept new to the law. For many years, courts of equity have been enforcing, against noncontracting parties, covenants made with respect to real property. (*Tulk* v. *Moxhay,* 2 Ph. 774 [1848].)

Other early English decisions suggest that the courts were conscious of the possibility of extending the doctrine to chattels. Thus, in *De Mattos* v. *Gibson,* 2 Ph. 774 (1848), holding that the charterer of a ship might specifically enforce his rights against a mortgagee who had notice of the charter, Lord Justice Knight Bruce observed:

> "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer

shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller. This rule, applicable alike in general as I conceive to movable and immovable property, and recognized and adopted, as I apprehend, by the English law, may, like other general rules, be liable to exceptions arising from special circumstances; but I see at present no room for any exception in the instance before us."[34]

The situation in this case is very close to the one which came before the court in *Bourjois* v. *Katzel*, 260 U. S. 689. There plaintiff was the assignee for the United States of the good will and trade marks of a French manufacturer of face powder and with slight modifications was using the marks and labels thus acquired in the United States, applying them to goods made in France and packed there. The defendant purchased goods of the original French manufacturer under the original trade mark, which it was conceded, the original manufacturer had retained for France. Defendant sold the original in this country in competition with the plaintiff. Plaintiff sought an injunction. Defendant argued that the goods she was selling

[34] In *Werderman* v. *Societe Generale d'Electricite*, 19 Ch. D. 246, 252 (1881), holding that the grantor of a patent was entitled to an accounting against the grantees' assignee, where the latter knew the terms of the grant, Sir George Jessel remarked:

"The parties intended certain liabilities to attach to the patent itself • • • It is quite plain that nobody could take the patent with notice of that arrangement, and say we will keep all the profits and will not be liable to account • • • It is a part of the bargain that the patent shall be worked in a particular way and the profits disposed of in a particular way, and no one taking with notice of that bargain can avoid the liability."

were the genuine goods, lawfully acquired and that there was nothing unlawful in what she was doing.

Mr. Justice Holmes said (p. 691):

> "If for the purpose of evading the effect of the transfer, it [the French manufacturer] had arranged with the defendant that she should sell with the old label, we suppose that no one would doubt that the contrivance must fail. There is no such conspiracy here, but, apart from the opening of a door to one, the vendors could not convey their goods free from the restriction to which the vendors were subject. Ownership of the goods does not carry the right to sell them with a specific mark. It does not necessarily carry the right to sell them at all in a given place."

This approach to the question finds additional support in *Bitterman* v. *Louisville and Nashville Railroad Company,* 207 U. S. 205, which held that the non-transferability and forfeiture clauses in a railroad ticket are binding not only upon the original purchaser but also upon any person who may acquire the ticket. Mr. Justice White said (pp. 221, 222):

> "That the complainant had the lawful right to sell non-transferable tickets of the character alleged in the bill at reduced rates we think is not open to controversy, and that the condition of non-transferability and forfeiture embodied in such tickets was not only binding upon the original purchaser but upon anyone who acquired such a ticket and attempted to use the same in violation of its terms is also settled. *Mosher* v. *Railroad Co.,* 127 U. S. 390. See, also, *Boylan* v. *Hot Springs Co.,* 132 U. S. 146.
>
> * * * * * *
>
> "Any third person acquiring a non-transferable reduced rate railroad ticket from the original purchaser, being therefore bound by the clause forbidding transfer, and the ticket in the hands of all

> such persons being subject to forfeiture on an attempt being made to use the same for passage, it may well be questioned whether the purchaser of such ticket acquired anything more than a limited and qualified ownership thereof, and whether the carrier did not, for the purpose of enforcing the forfeiture, retain a subordinate interest in the ticket amounting to a right of property therein, which a court of equity would protect. *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, and authorities there cited. See also, *Sperry & Hutchinson Co.* v. *Mechanics' Clothing Co.*, 128 Fed. Rep. 800."

The power of courts of equity to impose equitable servitudes on chattels is examined at some length in an able article by Professor Zechariah Chafee, Jr., published in Volume XLI, Harvard Law Review, page 945 (June, 1928) entitled "Equitable Servitudes on Chattels". Professor Chafee points out that restraints on the alienation of land, binding upon sub-purchasers, are common, and that similar restraints as to chattels are not entirely without precedent but, on the contrary, are quite within the powers of courts of equity, should practical considerations require their assertion. He concludes:

> "On general principles equitable servitudes on chattels seem a reasonable and flexible device, which the courts might use when desirable." (page 1007.)

It is significant that Professor Chafee is discussing equitable servitudes on chattels as creatures of courts of equity, unassisted by statutes. He considers the problem from the historical standpoint, and believes that courts of equity have the necessary power if they choose to use it. *A fortiori,* statutes may prescribe its use.

Courts of equity may have hesitated to enforce similar restrictions upon the alienation of personal property. But a legislature is not precluded from determining that, as to a certain class of personal property, conditions create an economic reason for permitting such restrictions. Where a legislature does so, it would seem the contention that such statute is unconstitutional ignores completely the historical antecedents and common law analogies for such a remedy.

Defendant looks upon the idea of compelling respect for the terms of a contract made by other parties as something wholly unprecedented. Yet that is exactly what is done every time a court of equity enforces an equitable servitude against a sub-vendee of property.

Many decisions of this court, cited elsewhere in this brief, uphold statutes which restrict the right to contract and the right of free alienation, even though such statutes were not in line with the historic antecedents and common law analogies pointed out by Professor Chafee. The statutes in such cases for that reason went far beyond the California Fair Trade Act, for they introduced entirely new social experiments and were often diametrically opposed to the prior common law. That this court upheld them indicates the breadth of the state's so-called "police power" and furnishes ample authority for the constitutionality of the statute now before the court.

(2) The doctrine of tortious interference with contract relations provides a further common law analogy.

The common law has dealt with various phases of the problem of protecting contractual relationships against breaches and interference caused by the otherwise legal acts of third persons. *Lumley* v. *Gye,* 2

El. & Bl. 216 (1853), led the way for the establishment, in nearly all common law jurisdictions, of the principle that the law will not permit a person wilfully to induce another to breach a contract. The leading cases on the subject are collected in: Carpenter, Interference with Contract Relations, 41 Harvard Law Review 728 (1928), and Sayre, Inducing Breach of Contract, 36 Harvard Law Review 663 (1923). In *Angle* v. *Chicago, St. Paul, Minneapolis and Omaha Railway Company,* 151 U. S. 1, this court applied and approved the common law doctrine.

The California Supreme Court recognized, in passing upon Section 1½, this common law analogy, saying (R. 38):

> "The common law, without statutory authorization, long recognized that unjustifiable interference with contract rights of others constituted a tort. * * * The statute here involved, in a large measure, merely extends that common law doctrine to the transactions enumerated in the statute."

This, of course, follows from the fact that the "willful and knowing" acts specified in Section 1½ inevitably induce breaches of the contracts authorized by the act and the common law of California.

IV.

Comments on Appellant's Brief.

Attempts are made to question the validity of Section 1½ by conjuring up extreme and improbable situations of fact under which its enforcement might be inequitable or difficult. There is hardly a law on

the statute books which could not be similarly attacked. Indeed, it is doubtful that any law exists which applies, ideally, to all imaginable situations.

Ample and controlling authority indicates that conceivable difficulties do not invalidate a statutory enactment and that the court in determining constitutionality should base its decision primarily upon the facts with respect to the parties before it. This court has said:

> "A statute may be invalid as applied to one state of facts and yet valid as applied to another." (*Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 289.)

> "Whether the provision of the ordinance, fixing the line with relation to the location of 60 per cent of the existing houses, in its general, or in some other specific, application is so vague as to amount to a denial of due process, is a question which does not concern petitioner, since, as applied to the facts in the present case, it is definite enough, and since, in any event, he has been excepted from the operation of the provision; and it does not appear that the alleged unconstitutional feature of which he complains has injured him or operated to deprive him of any right under the federal Constitution." (*Gorieb* v. *Fox,* 274 U. S. 603, 606.)

> "It does not appear that appellant is presently in any such danger of an unconstitutional application of these provisions of the statute as to entitle it to invoke a decision here upon the question, and the rule is well settled that 'a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage'." (*Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 186.)

A litigant may question a statute's validity only when

and so far as it is being, or about to be, applied to his disadvantage.[35]

We have in this case a definite and concrete fact situation set out in the complaint and admitted by the demurrer. The facts show clearly that appellant is not beset with any of the fantastic complications or hypothetical difficulties which he imagines. In this case there are not several contracts establishing different prices or a single contract used as the basis of a general price structure or an inequitable suit against one retailer when violations are tolerated by others. These are matters which, if they should appear, might well go to the equity of any particular suit and the trial court can deal with them as, if and when they arise. There is no need, it seems to us, to argue now any other case but this one.

The general attack on the Fair Trade Act as a whole would naturally suggest that appellant is arguing that the contracts which, in this case, he admits interfering with, are invalid since he is contending that the statute which authorizes them is invalid. But these contracts were good under California law before there was a Fair Trade Act. Nowhere does appellant assert that the contracts which this suit was brought to protect are not entirely valid. Appellant's argument must be considered in the light of the admission that the contracts are valid, that appellant knew of their existence and so conducted himself as to deprive the parties to the contracts of the benefits which would result from carrying them out. In addition, appellant's interference was willful. The section of the Act which deals with this situation is 1½. This is the only part of the

[35] *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. *Yazoo & M. Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217. *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571.

Act assailed as unconstitutional by the assignments of error. This section merely says that a person who, wilfully and knowingly, *i. e.,* with a bad purpose and without justifiable excuse, commits the acts which appellant admittedly has committed, may be sued civilly by anyone who suffers legal injury therefrom. Appellant's purpose and lack of justification are admitted, as well as the injury to appellees resulting from appellant's acts. This is the fact situation in this case.

It is then asserted that the Fair Trade Act is void as a delegation of authority. It cannot be a delegation of authority for the legislature of California to declare that contracts establishing resale prices on trade marked goods may be made, because in California the right to make such contracts already existed. It cannot be a delegation of authority to provide that suit may be brought for breach of the contracts, for this right existed also. Therefore, the asserted invalidity must reside in the right given to sue a person who is not a party, if he intentionally does an act which deprives those who are parties, of the benefits resulting from having their lawful contracts carried out. This the Supreme Court of California said was a proper application of the doctrine long ago announced in *Lumley* v. *Gye,* 2 El. and Bl. 216, and now almost universally recognized—that third party interference with contracts is actionable. Moreover, to invest regularly constituted courts with jurisdiction over a civil cause of action is not the delegation of legislative power, it is the exact opposite, it is the submission of a case to the judicial power to be decided in an orderly way.[36]

Appellant in making the argument that Section 1½ deprives him of liberty and property without due proc-

[36] For a discussion see "Constitutionality of the New York Fair Trade Act", Virginia Law Rev. March 1936.

ess because he cannot sell Factor trade marked goods at any price he likes, ignores paragraph 2 of Section 1 which provides:

> "Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:
>
> (1) In closing out the owners' stock for the purpose of discontinuing delivering any such commodity."

If appellant had a stock of Factor goods on hand and wanted to discontinue dealing in them he could close them out. Appellant, however, does not claim to sell Factor goods at less than their established prices under authority of this provision. He asserts the constitutional right to continue to procure and to sell Factor goods with knowledge of contracts establishing reasonable prices on them and thus to destroy the trade of others.

Moreover, as we read the assignments of error, no part of the Fair Trade Act except Section 1½ is in question, so appellee's criticisms that the statute is indefinite in some of its other provisions and therefore void need not be answered. However, there are two points where appellant seems clearly wrong. Appellant says (Brief, p. 21):

> "Appellant contends that the expressions 'fair and open competition' and 'general class' have no established meaning at common law. * * * The term 'general class' is, of course, utterly devoid of definite meaning."

The contrary is true. Both of these expressions have a definite meaning. "General class" is a familiar term in trade mark law and means a collection capable of general definition, a kind, goods that commercially are

commonly grouped together.[37] In this case the general class is "cosmetics".

The phrase "fair and open competition" or variants of it, is often used.[38]

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[37] U. S. C. A. Title 15 Paragraph 81—"Class of Merchandise"; Paragraph 85 "Classes of Articles"; Paragraph 131 "Classes of Merchandise". Pan-American Convention, signed at Washington, February 20, 1929, Chapter II, Article 3, Sec. 6, "merchandise of the same class"; Article 17, "merchandise of the same class"; Article 18, "merchandise of the same class" and "articles of the same class". British Merchandise Marks Acts of August 23, 1887, Sec. 16, par. (5), "different classes of such goods"; Section 18, "goods of a particular class". The words "goods of the same general class" frequently occur in the cases: *Pro-phy-lac-tic Brush Co.* v. *Abraham & Straus*, 11 F. Supp. 660, "the same general class of merchandise"; *Standard Oil Co.* v. *California Peach & Fig Growers*, 28 F. (2d) 283, "but goods are of the same general class when either their general and essential characteristics are the same"; *Ashland Refining Company* v. *United Collieries, Incorporated*, 20 U. S. Pat. Q. 171 "do the goods fall within the same general class"; *The B. F. Goodrich Co.* v. *Clive E. Hockmeyer, et al.*, 17 C. C. P. A. 1068, 1074, "goods of the same general class", "same class"; *Cheek-Neal Coffee Co.* v. *Hal Dick Mfg. Co.*, 17 C. C. P. A. 1103.

[38] Sec. 10 of the Clayton Act (15 U. S. C. A. 20); "free and fair competition". *American Column & Lumber Co.* v. *U. S.*, 257 U. S. 377, 400: "to maintain free competition"; *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 428: "to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade"; *Federal Trade Commission* v. *Algoma*, 291 U. S. 67, 78; "Fair competition is not attained • • •"; *Federal Trade Commission* v. *Raymond Bros. Clark Co.*, 263 U. S. 565, 572: "in the exercise of free competition". *Maple Flooring Mfgrs. Assn.* v. *U. S.*, 268 U. S. 563, 583: "Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities." *Trade Associations — The Legal Aspects*, by Benjamin S. Kirsh (Central Book Co. 1928) p. 15: "the legal conception of a fair and free competition • • •"

No more than passing reference need be made to the argument scattered through appellant's brief: (1) That this Act will be abused. The short answer to this is that appellant has not been subjected to any abuse. (2) That it may be invoked capriciously or maliciously. The answer to this is that in this case it has not been. (3) That persons may avail themselves of it whose trade marks may not be well known. Every sale of every commodity under every trade mark must have a beginning and the right attaches from the initial user. This has always been the law.[39]

Finally, as we see this case, the question whether goods bearing trade marks are affected with a public interest need not be decided since the Fair Trade Act does not purport to fix prices on them or on anything. Section 1½ is aimed at price cutting, not price cutting in general but the special kind of price cutting long recognized as injurious, that is, intentional price cutting on identified consumer goods, and here only to the extent of conferring upon the regularly constituted courts of California jurisdiction to entertain a civil suit by anyone suffering legal damage from it.

The Federal Trade Commission—by Gerald C. Henderson (Yale Univ. Press, 1924) p. 91: "* * * to protect the public interest in free and fair competition". At page 166: "restrictive of fair competition".

[39] *Kathreiner's* v. *Kneipp* (C. C. A. 7), 82 Fed. 321, 326:

> "* * * it is still not necessary, in our judgment, that a trade-mark in an article should be fully established, in the sense that the article be widely known, before the proprietor of its trade-mark or trade-name may be entitled to the protection of equity for the preservation of his rights. Otherwise it might be impossible with respect to a valuable and desirable article or product of manufacture, designated by a particular brand or in a particular manner, ever to establish a trade. * * * A proprietor is entitled to protection from the time of commencing the user of the trade-mark."

V.

Conclusion.

It is specious to contend that this statute is unconstitutional simply because its operation, in an absolute sense, has the effect of restraining individual conduct. That a statute deprives a person of a right which he formerly possessed, whether it be a right to go where he pleases, conduct himself as he pleases, buy or sell what he pleases, or use his property as he pleases, does not *per se,* brand it as unconstitutional. The whole process of civilization has consisted largely of the gradual surrender of the individual's right or liberty to make himself harmful or obnoxious to his fellow men. The necessity and rapidity of this surrender becomes accelerated as the population of the community increases and society becomes more and more highly organized. The founders of our Republic certainly had no intention of either prohibiting or retarding this *sine qua non* of civilized society; nor have our courts ever lost sight of it. The liberty secured by the Constitution of the United States is a liberty tempered by restraint.

This Court, in *Jacobson* v. *Massachusetts,* 197 U. S. 11, 26, expressed this fundamental principle in the following language:

> "But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with

> safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."

In accordance with these principles, it is well established that there is no absolute right of free bargaining. In his business as well as in his personal relationships, every individual is subject to restraints imposed by law for the purpose of promoting the general welfare, health, comfort, morals or prosperity of the community.

The price for property or services is only one of the terms in a bargain. The effect on the parties is similar whether the restriction on the power to contract affects the price, or the goods or services sold.

The test applied by this Court in a long line of cases, and, in fact, in all cases involving the liberty of contract, is well expressed in the language of Mr. Justice Hughes in *Miller* v. *Wilson,* 236 U. S. 373, 380:

> "As the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint —not immunity from reasonable regulation to safeguard the public interest — *the question is whether the restrictions of the statute have reasonable relation* to a proper purpose." (italics added).

What are the proper legislative purposes?

In *Chicago B. & Q. Railway Company* v. *Illinois,* 200 U. S. 561, this Court said (592):

> "We hold that the police power of a State embraces regulations designed to promote *the public convenience or the general prosperity,* as well as

> regulations designed to promote the public health, the public morals or the public safety." (Italics added.)

The police power also embraces the protection of substantial classes of citizens from abuses affecting them. The cases we have cited concerning hours of labor, time and mode of payment of wages, fees chargeable by attorneys appearing for injured employees, unfair competition by price discriminations and trade inducements, interest chargeable on loans and many others are all examples of the valid exercise of the police power for this purpose. Certainly the state may protect the trade marks which its laws create by giving redress by civil action to anyone suffering damage resulting from their use in a manner which the legislature may consider unfair. In sustaining the validity of the act here in question we think the Supreme Court of California was right and ask that its decree be affirmed.

Respectfully submitted,

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APPENDIX.

Resale Price Maintenance, Policy and Methods.

The aim of the existing fair trade acts is to protect a producer or vendor against price-cutting by enabling him to stipulate with his vendee what the resale price of the goods shall be. The acts apply to identified merchandise sold under competitive conditions. The limitation to goods identified by a trade mark, label, brand, or producer's name is important, because unless the merchandise is so identified that the ultimate consumer may compare retail prices on identical goods, the evils of price-cutting do not arise.

The problem is to determine at what point, as a matter of public policy, the line should be drawn between price maintenance to be permitted as a legitimate and proper protection of the producer and the whole public, and price-fixing to be condemned as restraint of trade and interference with normal and fair competition.

The Historical Background.

Almost since the beginning of commerce in its simplest form, the sale of goods from the producer directly to the user, there have been discussions of restraint of trade. At first each community was an isolated section, necessarily dependent on its own resources. Hence, for apparent economic reasons, the lawmakers and courts disapproved any act or contract which interfered with a producer's means of livelihood on the one hand, or on the other hand unduly deprived the

public in any manner of the products or skill which should have been available to it.[40]

With better roads and communication systems, commerce between the hitherto isolated communities began to develop and it was no longer necessary to guard the public so zealously against monopolies or excessive prices of their local producers. People and goods began to be available from other communities and the local producers were kept in check by the new competition. It began to be recognized that even a contract with a clause which laid some restraint upon trade might still be valid and acceptable "in cases where the special matter appears so as to make it a reasonable and useful contract." It was said that—

"In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, * * * and if upon them it appears to be a just and honest contract, it ought to be maintained." [41]

As time went by commerce and industry developed with more and more interchange between communities and geographical sections; but the English courts continued to consider the propriety of each contract brought before them on the basis of the special circumstances surrounding it. As late as 1894 a broader standard was adopted for the determination upon the facts of the reasonableness of a specific contract.[42]

It is notable that the leading cases in the United

[40] Oliphant, in Cases on Trade Regulation, discusses the early English statutes and cases.

[41] *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 197 (1711) cited by Mr. Justice Hughes in *Miles* v. *Park*, 220 U. S. 373.

[42] *Nordenfelt* v. *Maxim-Nordenfelt Guns & Ammunition Co.*, App. Cas. 535 (1894).

States on the question of restraint of trade, through price maintenance and otherwise, have generally been decided upon legal technicalities without the court even having before it any real factual information from which the true effect on trade and the economic welfare of the public could be determined. Yet the public today has as much interest as the public of any earlier period in employment problems, the ability to buy quality merchandise, and the prevention of monopolistic control. It is possible that if our courts could have had before them the detailed information equivalent to that before the English courts as a matter of general knowledge in the earlier days, the restrictive decisions on price-maintenance cases would not have been rendered.

The Early Price Maintenance Cases.

The earliest American cases which allowed resale price maintenance were patent cases. The theory behind them was that it was a part of the patentee's lawful monopoly to control (by proper procedure) the conditions of resale of his patented article by the distributor to the ultimate user.[43] Even after there had been decisions forbidding resale price maintenance contracts on other goods, the new rulings were still thought to have no bearing upon the monopoly of a patentee and his consequent right to prescribe resale conditions.[44] This theory of the patentee's rights was

[43] *Heaton-Penninsular Button-Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. 288 (1896); *Henry* v. *A. B. Dick Co.*, 224 U. S. 1; *Bement* v. *National Harrow Co.*, 186 U. S. 70.

[44] *Edison* v. *Smith Mercantile Co.*, 188 Fed. 925; *Automatic Pencil Sharpener Co.* v. *Goldsmith*, 190 Fed. 205.

upheld until 1917.[45] And even in 1918 Mr. Justice Brandeis urged, in a concurring opinion, that the right of a producer to fix resale prices was an economic question depending upon the relevant facts rather than any established legal principle.[46]

This right of a patentee to fix resale prices was extended and repeatedly recognized and protected by the Federal courts upon the ground of direct analogy between the rights and monopolies of patent and trade secret articles.[47] But the rule as to trade secret articles was overthrown by a decision of Judge Lurton:[48]

> "The mere fact that one article or class of articles is made under an unknown and private formula and another class is not is an undeniable fact which may serve for some purposes to differentiate them. But that single fact does not afford an economic reason, and still less a legal reason, for saying that it operates to exempt such articles from rules against unlawful restraint of trade."

This decision was followed shortly by, and was accepted by this Court in the first leading case on the subject of price maintenance—*Dr. Miles* v. *Park* (220 U. S. 373).

The Miles *v.* Park Case.

Prior to this decision, producers had looked upon the use of resale price maintenance as their right. The

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[45] *Motion Picture Patents* v. *Universal Film Co.*, 243 U. S. 502, which expressly overruled *Henry* v. *A. B. Dick*, 224 U. S. 1.

[46] *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8.

[47] *Dr. Miles Medical Co.* v. *Goldthwaite*, 133 Fed. 794; *Same* v. *Jaynes*, 149 Fed. 838; *Same* v. *Platt*, 142 Fed. 606; *Wells & Richardson* v. *Abraham*, 146 Fed. 190; *Jayne* v. *Loder*, 149 Fed. 21; *In re Park*, 138 Fed. 421; *Hartman* v. *Platt*, 142 Fed. 606.

[48] *Miles* v. *Park* (C. C. A. 6), 164 Fed. 803, 806.

most common device for effectuating it was by written contract with the distributor whereby he agreed not to resell the article below a stipulated price. The Miles Co. required every wholesaler and retailer selling its products to sign agreements to sell the goods at prices specified by the company. The defendant in this suit was a wholesaler who induced other wholesalers to sell to it at prices violating the agreement, and who in turn sold the goods to retailers at cut prices. The Court held that the contracts were void as a restraint on the alienation of title to property owned by the dealers, and as a restraint on competition, and for both reasons against the public interest. Mr. Justice Hughes held (p. 409):

> "The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

It is important to observe, however, that this case was decided without proof or consideration of the economic factors which might have supported the plan. While the decision purported to rest upon protection of the public interest, no facts had been produced to show what was the actual effect of such a plan upon the public welfare.

Yet the Miles decision did not go so far as to condemn all contracts which act in restraint of trade. Indeed, it was expressly pointed out (406):

> "To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void against public policy."[49]

[49] Citing and quoting *Gibbs* v. *Baltimore Gas Co.* (130 U. S. 409), and *Nordenfelt* v. *Maxim-Nordenfelt* (1904 A. C. 565).

Neither in this nor in succeeding cases has resale price maintenance been held illegal per se. So, for instance, in *Federal Trade Commission* v. *Beech-Nut Packing Co.* (257 U. S. 441), though the Court enjoined certain specified practices of the Beech-Nut Co., it at the same time declared that the order of the Commission forbidding any form of price maintenance was too broad. In *Cream of Wheat Co.* v. *Federal Trade Commission* (14 Fed. (2d) 40, 48 (C. C. A. 8)), the court directed a proviso to the Commission's order to specify what the company might lawfully do to correct its resale price policy.

Wherever injunctions against resale price policies have been granted, they have been aimed at the methods that have been used to achieve the desired result, and the Court has not hesitated to approve resale price policies where the methods used were acceptable to it.

Methods Adopted Since the Miles Case.

The result of the Miles decision was that producers began to cast about for new and legal methods of maintaining retail prices at the desired level. The first of these new methods which went before and was approved by the Court was that set forth in *U. S.* v. *Colgate & Co.*, 250 U. S. 300. The manufacturer gave notice to the retailer that the goods were not to be sold below a "suggested" retail price, and supplemented this notice by a policy of refusing to sell to retailers who did not adhere to the suggested price. The Court held that no contract for price maintenance had been made; that a trader or manufacturer had a right to exercise his discretion as to the parties with whom he would deal; and that he might announce in

advance the circumstances under which he would refuse to sell.

This ruling has been followed in subsequent cases, such as *Harriet Hubbard Ayer* v. *Federal Trade Commission* (15 Fed. (2d) 274) and *Shakespeare* v. *Federal Trade Commission* (50 Fed. (2d) 758).

Another method which has been pronounced legal by this Court is that adopted by the General Electric Co., very fully set out and discussed in *United States* v. *General Electric Co.* (272 U. S. 476). This company appointed over 21,000 dealer "agents" throughout the country, to whom the goods were shipped on consignment, title to remain in the manufacturer until sale at a specified price. The Court held (488):

> "The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer."

Thus there are two ways by which, with the full approval of the law and the courts, a producer may control the price at which his merchandise is sold to the public. Yet many manufacturers who would like to achieve that result are either unwilling or financially unable to adopt either of these methods. The refusal-to-sell policy is a precarious one, because if it is carried out to the extent of affording real protection against price-cutters, the manufacturer may find that through the very willingness of his distributors to cooperate with him a combination has developed which is an illegal restraint of trade.[50] It may often be an ineffective policy because, despite the refusal of a pro-

[50] As in *Toledo Pipe-Threading Co.* v. *Federal Trade Commission* (11 Fed. (2d) 337).

ducer or his regular distributors to sell the price cutter, the latter invariably, often deviously, manages to get the goods.

If the manufacturer wishes to turn to the agency plan to control retail prices, he is faced with another, and in many instances an almost insuperable, difficulty. He must deal directly with retailers under contracts which are necessarily involved if they are complete.[51] He must set up and carry the financial burden of a whole private system of distribution. He cannot avail himself of the existing established channels. The average manufacturer cannot afford to set up a nation-wide system of his own or to carry it on with the requisite investment of capital, the additional burden of records and checking up, and the continuous close contact with his dealers which must follow the adoption of such a system.

Because of these difficulties and because in spite of them it has still been felt essential to devise some means of controlling resale prices, both manufacturers and distributors have turned to the idea and the hope embodied in the State fair-trade acts.

The Necessity for Resale Price Maintenance.

As competing channels of distribution developed with the increase of merchandising, competition between them became very keen. Price-cutting became the chief competitive weapon, and products under trade-marks or brands well-known to the consumer were obviously best adapted to the price-cutter's purpose. The greater "saving" he could offer the public

[51] Consider the many ramifications of the contract in *General Electric case*, 272 U. S. 476.

on goods the standard value of which the public knew, the more likely was the price-cutter to get customers out of his competitors' stores and into his own. More often than not, his competitors retaliated and a price war was on.

(A) To the Manufacturer.

The first economic effects of this system were felt by the manufacturers. The consumer market is the actual market of the producer, even though he may have parted with title to the physical goods before they reach the consumer. To retain his market and preserve his business and goodwill the producer must successfully solve several problems:

(1) He must have wide and well-established distribution, so that the consumer may be able to procure the goods when he wants them. But price-cut goods carry little or no profit for the retailer and hence little or no inducement to handle them.

(2) He must be assured of a reasonably even flow of distribution, so that he may be able to establish a normal course of business, may always have goods available to fill orders, yet not be left with too large a stock on his hands. But either price wars or steady price cutting disrupts the flow, because they tend to saturate the market and discourage retailers from handling the goods.

(3) He must be able to distribute his goods on such terms that the retailer can make a legitimate profit and not be tempted to substitute another brand of goods on which a greater profit can be realized.

(4) He must preserve his reputation as a manufacturer. When a cut price on goods prevails over a

long period of time, the public does not stop to analyze the dealer's reason for it. It assumes that the dealer must still be making a profit, even at the low price. The manufacturer's reputation for fairness is damaged because it is thought he has fixed an excessive price at the outset, or has subsequently used inferior and cheaper materials.

(5) Above all, he must preserve the good reputation of his goods. A quality product, consistently sold at or below the price level of a cheap product, becomes in the minds of consumers a cheap product too, because they associate it with other products in the same price group. Thus they come to believe that the normal standard price for the product is excessive and more than the article is worth.

It is apparent that either a cut-rate war or a long period of cut prices may be disastrous to a manufacturer. Either may disrupt the normal flow of his business, perhaps permanently cut off some of his avenues of distribution. His reputation and the reputation of his goods may be seriously damaged. His advertising is wasted because it becomes ineffective through lack of distribution or lack of public confidence. And he faces all this for no reason except that at the outset his reputation is good, his products are in demand, are of recognized value, and are known to be worth the normal price.

(B) To the Wholesaler.

In the earliest days of commerce it was generally possible for a retailer and often a consumer to deal directly with a manufacturer. Then a wholesaler was viewed with disfavor by the public as a "middleman" whose participation in commerce increased the cost of

the goods to the consumer without serving any useful purpose. But as intersectional commerce spread it became increasingly difficult for even the retailer to deal directly with the manufacturer. Now the wholesaler fills an important and valuable place in the modern scheme of distribution. He often takes the responsibility of introducing a new product into a territory which the manufacturer might be unable, through lack of capital, to reach. Even on well-known merchandise the wholesaler is of immense service to the producer and to the retailer on matters of credit and facility of distribution; and this service benefits the consumer too by making available the goods he desires to buy.

The wholesaler has became such an important link in the chain between the producer and the user of manufactured goods that his elimination would cause a serious disruption in distribution. He is most needed in interstate commerce, where the goods may have to be sent across the continent to reach their ultimate user. Yet this is the very place where the present state of the Federal law is forcing his elimination.

(C) To the Retailer.

Some of the present problems of the retailer are akin to those of the manufacturer. To preserve his trade he must carry in stock the well-known products that customers are likely to call for. He must be able to estimate what his normal sale of those items will be, so that he will not have to turn away customers unsatisfied and still need not keep his capital tied up in an unnecessarily large stock of goods. He must preserve the goodwill of his business by a justifiable reputation of selling quality goods at a fair price.

The small retailer—as, for instance, the neighborhood druggist—is often the one who is most useful to consumers, through convenient availability of goods and through actual services rendered in connection with them. He must, of course, have a fair margin of profit on his sales to carry his overhead and cover the services he renders. And he is the retailer who suffers most immediately and perhaps most disastrously from price cutting.

The small retailer has to face price-cutting competition from two classes of stores. The more legitimate is the group of chain stores or large department stores, which may, by quantity buying, be able to get the same goods on better terms and to pass part of the saving on to their customers. It is common practice, however, for such stores to choose well-known items—and the better known the merchandise, the more desirable for their purpose—to use as "loss leaders" or "bait." The drastic cut below the standard price may be either temporary or permanent. It does not much matter because they hope to and do recoup the sacrifice through the added sales of other merchandise to the customers thus attracted to their stores.

The other consistent price cutters are the cut-rate stores, which are a fairly recent commercial development. They may have had their origin with dealers who did not know how to figure their costs and who honestly felt that they did not need the normal margin of profit on a particular article. But the usual cut-rate store is not of this type. It uses the price-cut merchandise to attract customers to the store, and then derives its real profit, in one of two ways. The customer, deceived by the low price on the goods whose value he knows, may be persuaded to buy additional "bargain"

merchandise on which the dealer's margin of profit is in fact excessive. Another method is to persuade the customer to buy in the place of the cut-price goods, unknown and inferior brands at about the same price level but on which again the dealer is able to make an excessive margin of profit.

These cut-rate stores provide very stiff competition for the average retailer. They usually have inexpensive quarters and equipment. Indeed, they are commonly known as "pine board stores." They handle only fast-moving merchandise because they do not attempt to render complete service to the public; and for volume of sales they depend upon price rather than upon the continued goodwill of their customers.

It is generally conceded that the activities of price cutters lower the current sales price, and therefore the margin of profit, of every dealer in the vicinity. The public becomes familiar with the cut price and accepts it as a proper price for the goods. If a retailer does not meet the low price, he is thought to be making an excessive profit. If he does meet it, he sacrifices the profit he needs to sustain his business. If, because he cannot meet the price competition, he discontinues the sale of the goods, he risks the complete loss of his customers who will fill their other requirements at the place where they can buy the discontinued item.

(D) To the Consumer.

A primary consideration on questions involving restraint of trade or fair competition has always been the ultimate effect upon the welfare of the community and of the individual consumers who make up the community. The interest of the individual consumer is to get

merchandise of good quality at a fair price. The obvious premise is that if competition forces down prices of quality goods the consumer will benefit. But the known results of price cutting on trade require deeper analysis of the effect upon the consumer.

Price cutting is a practice peculiar to urban centers. Consider the situation of the average urban resident. He lives in a residential section at some distance from the main business and shopping center. Somewhere in this center he may buy anything he desires, from a new automobile to a headache tablet. But the headache tablet he wants when he has a headache, not when he happens to be in the shopping district. He lives in more or less limited quarters with little storage space for supplies which he may not need for a long time. So he likes to buy his supplies when and as his need arises, not when and as he can make a special shopping trip.

From these circumstances arise the neighborhood stores to serve his convenience. Prompt service because they are near, comparatively easy establishment of credit because he is personally known, quick availability of emergency items outside of shopping hours —all these are the factors of convenience and necessity that make the local store indispensable. But the local store cannot survive unless it can draw enough business from the neighborhood on a fair margin of profit to support it.

What happens when a cut-rate store comes into the neighborhood? The consumer is attracted to the new store by the prices of familiar products far below the standard price his usual dealer has charged. He feels that he is making a big saving—so he makes other purchases at the new store, too. He buys unknown and inferior goods on the assumption that they are also

bargains, and pays a price far in excess of their actual value. And while he is led away by the normal human love of a bargain, his old retailer is suffering from the loss of his business.

Eventually he wants something that the cut-rate store does not carry because it does not move fast enough, or wants some service that the cut-rate store will not give. Then he goes back to his old local dealer, but what does he find? Business has dropped off, so the retailer no longer carries the full stock in any line that he used to have. Some items have ceased to be profitable if he has to meet cut prices, so he no longer has them available at any price. Profits in general have decreased, so he can no longer render the service he used to give. The consumer finds himself cut off from any local source of supply and deprived of the easy accessibility which his living circumstances require. His cut-rate "savings" are swallowed up by the general injury to his comfort and welfare.

Moreover, the owners of independent stores, their families, their employees, their landlords, and all persons who supply their economic needs and desires comprise a large portion of those whom we loosely refer to as "consumers." Manufacturers of branded goods and their employees are also "consumers." The Fair Trade Acts have sound economic justification in their aid to these particular consumers as well as the protection they afford to all consumers by preventing practices which drive reputable products off the market and deception which facilitates both substitution and sales of over-priced goods.

The Existing Fair Trade Acts.

When these effects of price cutting began to be felt, there began immediately to be agitation for a remedy. The Miles decision cut off the most obvious plan, as affecting goods which passed in interstate commerce. The Colgate and General Electric plans were awkward, troublesome, and too expensive for the average manufacturer. Finally the States began to take an interest in the problem and to consider whether, within the scope of their jurisdiction over intrastate commerce, they could not find a remedy.

California was the first to take definite action. In 1931 it adopted a law which was amended in 1933 to strengthen its effectiveness. This California law has been used as a model for similar legislation elsewhere, and thirteen other States have adopted substantially identical laws: Illinois, Iowa, Maryland, New Jersey, New York, Oregon, Pennsylvania, Washington, Wisconsin, Ohio, Louisiana, Virginia, and Rhode Island. It is notable that these 13 States contain over half of the population of the United States.

Though some of these laws vary slightly in their provisions, they all provide for contracts between the producer and the distributor of identified merchandise, wherein the distributor's resale price is definitely fixed. The distributor may in turn contract with retail dealers for resale at a specified price. Thus the producer may fix the final resale price to the consumer. Selling or advertising the merchandise at less than the fixed price "wilfully and knowingly," *i. e.,* for a bad purpose, without justifiable excuse, is actionable by anyone injured thereby whether or not the price cutter is a party to the resale contract.

However, such contracts may be made only with re-

spect to goods which are in fair and open competition with other products of the same class made by others. And dealers in the same distribution group—as, for instance, two retailers—may not make resale price agreements with each other. Exceptions are made for resale at lower than contract prices in specified circumstances, such as in the case of damaged goods and bona fide close out sales.

New Jersey has another unfair trade law which was first adopted in 1913 and amended to its present form in 1915. It permits a manufacturer to fix resale prices by affixing a specified form of notice to his goods. Violation of the terms of the notice is actionable by any injured party. It has been little used until now but it may present a practical alternative for contracts under the general type of fair-trade act.

In Connecticut the California type of fair-trade act failed to pass, but a retail drug control act was adopted in 1935. It provides that (with specified exceptions) no drug retailer shall sell goods at a price below the manufacturer's wholesale list price per dozen or per unit, and a violating retailer is subject to a fine of $500.

The purpose and effect of the State fair-trade acts is not to fix or maintain prices on a high level. It is to enable a producer of trade-marked goods to protect his distribution by insuring a sustaining profit to his distributors, with consequent benefit to everyone.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 79.

CLARENCE G. KUNSMAN,
Defendant-Appellant,

vs.

MAX FACTOR & CO., AND SALES BUILDERS, INC.,
Plaintiff-Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED MAY 25, 1936.

BRIEF FOR AMERICAN BOOKSELLERS' ASSOCIATION, *AMICUS CURIAE*

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ARGUMENT.

The demurrer concedes (a) that the Max Factor trademark-contracts in issue are lawful and enforceable in California and (b) that defendants' cut-rate practices will force plaintiffs' dealers to cancel the contracts to the injury of plaintiffs and their dealers ---------- 23

Trademarked or branded goods produced by the trademark proprietor and sold by dealers on his name, reputation and good-will in competition with commodities of the same class produced by others are and have long been regarded as a very special kind of property as to which the good-will and reputation of the producer inalienably run with the goods and to whom there is a constant possibility of reverter for defects, repairs or new supplies and by whom the goods are impliedly or expressly guaranteed. Such goods therefore in California and other states and in other nations have always been treated as an exception to the common law rule against alienation and susceptible to transfer under reasonable vertical price restrictions without violation of the rules or statutes against alienation and unreasonable restraints ---------- 25

Price maintenance on such special or trademarked fungibles is not unlawful *per se* even in interstate

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commerce but only when title to the goods is passed. The emphasis on the commercially unimportant rule against alienation or transfer of title has freed the goods but enslaved the formerly free dealers by making them into plutocratically and autocratically regimented agents selling branded goods at controlled if not manipulated prices, all to the gross injury of trade and oppression of the public. This is the evil with which the legislature dealt in the Act in issue ---------- 25

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 79.

CLARENCE G. KUNSMAN,

Defendant-Appellant,

vs.

MAX FACTOR & CO., AND SALES BUILDERS, INC.,

Plaintiff-Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED MAY 25, 1936.

BRIEF FOR AMERICAN BOOKSELLERS ASSOCIATION, *AMICUS CURIAE.*

May it please the Court:

Defendant-appellant, Kunsman, will be referred to throughout as defendant and the appellees as plaintiffs.

The case involves the question whether Section 1½ of the so-called California Fair Trade Act which applies the doctrine of unfair competition to the protection of vertical resale price contracts relating to trade-mark commodities is in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

Defendant does not question the validity of the contracts, but questions the constitutionality of the method adopted to protect them against nullification by strangers.

The case arises on demurrer and the facts as pleaded are admitted.

The Admitted Facts (T. R. 1-21).

Plaintiffs are engaged in the manufacture and sale of certain trademark commodities (T. R. 2-3) which are in fair and open competition with commodities of the same general class produced by others (T. R. 6-9). Plaintiffs established certain wholesale and retail prices for said trademarked products, but there developed years ago a practice among certain "Cut Rate Drug Stores" of selling trademarked products at prices conspicuously below the established prices and the resulting retaliatory price-cutting caused the goods in many cases to be sold at a loss thus depriving the producer of a market and injuring or destroying his good-will (T. R. 7).

To remedy the many evils of these price cutting practices, California passed an act entitled and reading as follows:

> An act to protect trademark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name.
>
> (Approved May 8, 1931, Stats. 1931, p. 583. In effect August 14, 1931.)
>
> 1. Certain sale contracts declared lawful.
>
> 2. Exception.
>
> 3. Definition.
>
> 4. Constitutionality.
>
> 5. Short title.
>
> 1. Certain Sale Contracts Declared Lawful.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the

trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

"2. Exception.—This act shall not apply to can contract or agreement, between producers or between wholesalers or between retailers as to sale or resale prices.

"3. Definitions.—The following terms, as used in this act, are hereby defined as follows:

'Producer' means grower, maker, baker, manufacturer or publisher.

'Commodity' means any subject of commerce.

"4. Constitutionality.—If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

"5. Short title.—This act may be known and cited as the 'Fair Trade Act'."

The Section in Question.

Section 1½ of said Fair Trade Act, being the provision whose constitutionality is here involved, was added in 1933 (Stats. 1933, Chapter 260, page 793) and provides as follows:

"Sales below contract price.—Wilfully and knowingly advertising offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

Plaintiffs, as authorized by the Act, made contracts with practically all the wholesalers and retailers in California prescribing fair and reasonable prices for their trademarked goods, said prices being admittedly no higher than required to yield the distributors a reasonable compensation for their services (T. R. 9).

A contract was tendered to defendant who refused to execute it and thereupon plaintiff refused to sell to defendant (T. R. 10).

Defendant thereupon secured said trademarked products from sources unbeknown to plaintiffs and sold and con-

tinues to sell them at cut prices without closing out the line (T. R. 11 and 13).

Unless defendant is restrained under the Fair Trade Act, plaintiffs' dealers will cancel their contracts so as to be free to meet defendant's prices, predatory price cutting will again ensue, plaintiffs' business and good-will will be injured if not wholly destroyed, and plaintiffs' distributors will be prevented from earning a reasonable profit in the sale of plaintiffs' trademarked products (T. R. 12-13).

Plaintiffs have no remedy at law and seek an injunction to restrain defendant from selling plaintiffs' trademarked commodities at prices less than those prescribed in the retail contracts (T. R. 14).

The demurrer was sustained by the Superior Court but overruled on appeal by the Supreme Court of California.

The appeal is directed to the one contention that Section 1½ of the California Fair Trade Act violates Section 1 of the 14th Amendment to the Constitution of the United States. (T. R. 58-59.)

As the book departments of department stores, cut rate chain stores, catalog houses and the like have largely become "loss leader" departments, to the grave injury of independent book dealers, American Booksellers' Association has applied for leave to file this brief as *amicus curiae* in support of the constitutionality of Section 1½ of the Act in question.

The Questions.

Defendant's sole contention is that Section 1½ of the California Fair Trade Act is unconstitutional because violative of Section 1 of the 14th Amendment to the Federal Constitution reading:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Defendant concedes the power and right of California to lift the ban of the common law rule against alienation* and of the rules and statutes against restraints of trade from vertical but not horizontal contracts relating to resale prices of trademarked articles of a competitive nature while in lively course of trade and subject to definite exceptions as to close-out or "dead line", deterioration or court order sales, but affirms that the 14th Amendment inhibits the state from protecting such contracts against wilful nullification by non-conforming dealers.

Defendant apparently seeks to present the case as though it concerned an attempt by the state to subject plaintiff's trademarked goods owned outright by defendant, to the servitude of admittedly fair prices set up by admittedly lawful contracts made by others before or subsequent to appellant's acquisition of title.

But that question does not arise in this case or in real trade practice. The Act permits defendant to close out

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*"'. . . a general restraint upon alienation is ordinarily invalid. 'The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void.' 'If a man', says Lord COKE, in 2 Coke on Littleton, sec. 360, 'be possessed . . . of a horse or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest and property is out of him, so as he hath no possibility of a reverter; and it is against the trade and traffic and bargaining and contracting between man and man.' John D. Park & Sons Co. *vs.* Hartman, 12 L. R. A. (N. S.) 146, 82 C. C. A. 158, 153 Fed. 24. See also Gray, Restraints on Alienation of Property, Secs. 2, 28." Mr. Justice HUGHES in *Dr. Miles Med. Co.* vs. *John D. Parks & Sons Co.*, 220 U. S. 373, 55 Law Ed. 503.

his supply of plaintiffs' trademarked goods, however acquired, at any prices he pleases and at any time, and whether acquired before or after the contract system is set up.

That is not what defendant seeks. He claims that the 14th Amendment guarantees him a sort of vested right to continue to purchase new supplies of plaintiffs' trademarked products from secret sources and to sell them right along in California at cut or close-out prices without closing out the line and without liability for damages for the admitted nullification or cancellation thereby worked upon the admittedly legal contracts.

And the question is: does the 14th Amendment to the Federal Constitution guarantee to defendant any such alleged right to continue a cut-rate business in plaintiff's trademarked products after the contracts have been set up?

Defendant admits that when he cuts the price on Max Factor products, other dealers have to meet the cut or close out the line and competition finally brings the price to a loss level.

The question then comes down to this:

Defendant claims that the 14th Federal Amendment guarantees him a continuing right to fix a loss-price on plaintiffs' branded goods in the hands of their dealers but denies that said amendment guarantees plaintiffs a right to fix a reasonable and profitable price on the same trademarked goods in the hands of defendant, and the question is as to the legislative and judicial power of California to regulate these conflicting rights in the public interest.

Does the 14th Amendment guarantee to those who make concededly lawful resale price contracts in intrastate commerce in California a right to have their lawful contract rights protected against what the legislature regards as unfair competition by strangers?

Is not the defendant the one who really seeks to violate the 14th Amendment by depriving plaintiffs and their distributors of property and rights without due process of law by continuing to tear down and wreck a system of California contracts which he concedes to be lawful as between the parties but which he claims a sort of vested right under the 14th Amendment to wreck or nullify?

It is settled doctrine that the judicial power of this court is limited:

> 1. To determining whether the subject-matter of the legislation is within the state's power under the Federal constitution; that is, whether the state legislature has power to limit, control or regulate methods of trade and competition within the state.
>
> 2. To determining whether the means adopted (a) by legalizing vertical contracts as to competitive trade-marked goods with the close-out sale and other exceptions noted, and (b) by declaring that wilful interference is actionable as unfair competition, are violative of the Federal constitution because they are:
>
> 1. Not reasonably designed to accomplish the purpose in view;
>
> 2. Do not have a real and substantial relation to the objects sought to be accomplished;
>
> 3. Are arbitrary, discriminatory or capricious.
>
> *Nebbia* v. *New York,* 291 U. S. 502, 54 Sup. Ct. R. 505.

It is submitted that a correct answer to these questions requires a full consideration of the entire trade situation with which California had to deal and we have taken up the matter in that way as to both intrastate and interstate commerce in California.

Summary.

1. A trademarked or branded commodity is a special fungible:

(a) Constituting an exception to the rules concerning alienation and trade-restraints,

(b) therefore capable of being transferred subject to a valid restriction voluntarily assumed by the new owner to resell only at a certain contract price which is being currently charged by other contract-dealers handling the same trademarked article.

Propositions (a) and (b) are not questioned by the defendant on this appeal.

(c) Therefore, the State, under its regulatory and police powers, may lawfully outlaw, as unfair competition, the business of dealing in such trademarked commodity at a cut or non-contract price unless:

(1) To sell out the line or

(2) When the commodity is damaged or deteriorated.

(3) Under order of court.

The appeal as presented questions only proposition (c) as to the police and regulatory powers of the state to protect the contracts against nullification by strangers.

2. A trademarked commodity is a special fungible, properly excepted by the state from the operation of the rules against alienation and restraints of trade, and therefore capable of transfer under a lawful contract restricting the resale price, and the state therefore has power to protect such contracts against nullification by strangers, under the doctrine of unfair competition, because all of the commodities identified by a certain trademark:

(a) Come from one common source of origin.

(b) The source is publicly advertized on the article by the display of the trademark.

(c) All similar articles under that trademark are standardized as to quality and interchangeable as to value.

(d) The trademark owner receives good-will for good quality or bad-will for defects.

(e) All such articles under one trade-mark, being stamped as standard as to origin and value by the trademark, are capable of being sold only at one price at the same time in the same market. That is to say when one dealer in a certain shopping market marks down an Ingersoll Dollar Watch or a book called "Anthony Adverse" of a certain edition, that dealer thereby marks down that watch or that book to that same price on the shelves of all other dealers in that market at that time, because the operation of the law of market price is inexorable and inescapable. There can be only one price for the same thing in the same market at the same time. The trademark or imprint is the public symbol and guarantee that the Ingersoll watch or the book "Anthony Adverse" is *the same thing* as every other "Ingersoll" or "Anthony Adverse", whether in the hands of one dealer or another. Therefore one dealer would not even try to charge the regular contract price for that thing if another dealer in the same article was offering it at a lower price at that time. This fact is admitted in the case at bar.

(f) There can be no such thing as true individual freedom as to trademarked fungibles such as Ingersoll watches, Ford automobiles or books of the same title, edition and imprint or the like. Two men may own a dog but if one owner decides to kill his half,

he kills the other man's half also. King Solomon wisely decided that the woman who was willing to take one severed half of a live child did not own either half.

(g) When defendant argues that he merely wishes to do with his own as he pleases, plaintiff answers that he can do that lawfully by closing out the line. But when defendant argues that he should be permitted to keep on injuring all other dealers by stocking up with a new supply so as to go on selling right along at cut prices, then defendant is disingenuous in claiming that the 14th Amendment guarantees him a right thus to mark down the price of the same article on the shelves of thousands of other dealers in the same article in the same market at the same time, as he admittedly does.

(h) On the ground of the greatest good to the greatest number, the 14th Amendment guarantees the right of these thousands of regular dealers to purchase the same thing for resale under lawful contracts at the same admittedly reasonable price as is charged by other dealers and to look to the state to guard such lawful contracts against destruction by scab dealers or price-cutters like the Ticket Scalpers whose business was enjoined and destroyed by this Court in *Bitterman* v. *Louisville and Nashville Railroad Co.*, 207 U. S. 205, 52 L. Ed. 171.

(i) Such trademarked fungibles usually are sold at an advertized price, frequently marked on the article, and, where freight is material, F. O. B. a base point.

(j) It is really the producer and not the retailer who promotes the sale of a trademarked commodity. The retailer collects the retail price but the producer does the advertizing.

(k) Producer advertizing is diametrically opposite to all legitimate dealer advertizing. The legitimate dealer advertizes in effect "Come to my store and buy on my reputation as a retailer." The producer advertizes "Buy my branded article wherever you find it. It is just as reliable—just the same thing—when sold by one retailer as another." The retailer seeks to instill his advertizing and good-will into his store; the producer, into his *branded product.* When a retailer advertizes a branded product at a cut price, he is indulging in lawful larceny. He is stealing the producer's national or product-advertizing for the retailer's ulterior purpose. Price-cutting is a cheap way of drawing trade to an unscrupulous retailer who does not care how much he injures the branded product by driving it down to a price level at which legitimate dealers cannot make a profit on it. The difference between product-advertizing or so-called "national-advertizing" of a producer of a trademarked product, on the one hand, and of a legitimate retailer who advertizes himself or his store rather than seeking to magnetize a particular branded product with his good-will or reputation, strongly emphasizes the fact that a trademarked or nationally advertized article is a very special kind of property constituting an exception to the rule against alienation. The producer can lawfully buy and pay for the advertizing of a self-selling or magnetized trademarked product, but a tricky retailer can then lawfully steal the advertizing for himself, unless the act in question is valid.

3. Where *the same thing* (*i. e.,* articles whose fungibility and common source of origin are attested by the producer's trademark) can have only one price at the same time in the same market (because no purchaser will pay more than the lowest price offered in that market and no seller will take less), the question is whether that *one price* shall be set by

knaves acting for some ulterior purpose of their own, as Mr. Justice HOLMES fairly stated it in his dissenting opinion in *Miles* v. *Park,* 220 U. S. 373, 55 L. Ed. 502, 31 Sup. Ct. 376, or whether that one price shall be set by voluntary contracts between the producer and the great body of dealers (who, along with the public, do not have to buy the article at all or can freely turn to a competitive make)? When knavish or loss-leader competition sets the standard, uniform or one and only price which a standard article can bring at that time in that market, we see conditions like those under which the Modern Library (Dollar) Books were advertized by price-cutters for sale in the New York market new at *nine cents per copy!* We see R. H. Macy & Co. admittedly paying one dollar per copy for Amelie Rives' "The Castaway" and reselling it at *eighty-nine cents!* (See opinion in *Bobbs-Merrill* v. *Straus,* 210 U. S. 205.) Scab labor cannot long endure at a below-cost standard of living, but a scab-price-cutter can lose heavily on "The Modern Library" or the "Castaway" and charge the losses to advertizing because the practice lures people down to a grossly expensive store where the crowds can be overcharged on other lines of goods.

Defendant claims that plaintiffs and thousands of regular California dealers attempt, under legislative sanction, to fasten a concededly fair and reasonable price on defendant, but the stark fact is that defendant seeks by his individual act and for a grossly selfish purpose, to fix an unreasonable and unfair price on plaintiffs and their fair and regular dealers.

Plaintiffs deny there is any price-fixing involved in this because their contract price must be fixed in a highly competitive market by

(1) the consumer who does not have to buy an over-priced article;

(2) the dealers who do not have to handle

(3) the producer who is looking for the price of greatest return which usually means wide distribution at reasonable prices and

(4) competitive producers of both branded and unbranded goods who are always ready to undersell an over-priced article.

But if there is price-fixing involved, then the defendant seeks to fix his price on identically the same article on the shelves of all dealers at the same time in the same market. Defendant cannot have it both ways. If it is fair for defendant to have an individual right to mark down or fix a ruinous price on goods owned by thousands of dealers in the same market, it cannot be unfair for the legislature to authorize such dealers to impose *a concededly fair, reasonable* and *competitive* price on defendant.

4. Because the law of market price or fungibility decrees that there can be only one price for the same thing in the same market at the same time, and because, when that one and only price for an article whose fungibility or family relationship to its fellows, is attested by a trademark, is fixed by individual whim, that one price goes down to an uneconomic or unprofitable level gravely injurious to producer and dealer alike (and therefore injurious in the long run to the public), producers and dealers alike have worked out and adopted various concededly lawful systems for preventing any articles bearing a certain trademark from falling into the hands of price-cutters. Make no mistake. The several expensive and cumbersome legal devices for effectively establishing standard prices on trademarked commodities are *lawful boycott devices.*

They are plans by which producers and dealers lawfully cooperate to prevent price-cutters from securing the trademarked article in any practical way. The producer deals only with regular distributors or wholesalers who in turn agree to deal only with regular and authorized dealers who in turn must deal only with the public (*U. S.* v. *General Electric Co.,* 272 U. S. 476, 71 L. Ed. 362). If price-cutters could secure the goods for resale at cut-prices, the whole plan would be vitiated—made worse than useless—converted into a hideous and absurd expense with its one and only purpose and object frustrated by those at whom it is aimed.

5. Retail and wholesale price stabilization of either trademarked or unbranded commodities, whether or not they are in fair and open competition with similar commodities of other producers, is lawful and not regarded as unlawful "price-fixing" or as an unreasonable combination in restraint of trade or as an unlawful boycotting of price-cutters, or as a violation of either the letter or spirit of the rule against alienation, when effected:

a. by combining wholesalers and retailers as agents of a common principal and not passing title to the commodities until the final sale to a consumer.

Miles v. *Park, supra;*
U. S. v. *Gen. Electric, supra.*

b. by establishing chains of stores or service stations. *U. S.* v. *American Tobacco Co.,* 221 U. S. 106, in which the legality of United Cigar Stores Company, as a chain organization, was recognized. Trademarked shoe manufacturers use chain stores to standardize the prices on their special brands of shoes.

c. by establishing wholesale depots, producer-owned, in all large markets and keeping retailers on a

hand-to-mouth basis whereby any retailer who cuts a price today can secure no more supplies tomorrow.

U. S. v. *Colgate,* 250 U. S. 300.

This plan clearly involves a projection of the control of the producer over articles sold to and owned by another. The dealer-owner is effectively restrained from selling the articles he owns at any price he pleases because he knows that if he does so, he will be at once cut off from getting any new supplies of the same trademarked article. The title has passed but the producer's control continues in a completely effective way.

6. Retail and wholesale price stabilization established by vertical resale price contracts, protected, under the law, against nullification by strangers, and limited to trademarked commodities which are in free and open competition with similar branded and unbranded commodities of other producers, is less oppressive to the public, more open to use by small producers with capital too limited to continue to own their goods throughout wholesale and retail distribution, and more protective of single store or small retailers than are the lawful methods of price-stabilization based on agency, consignment, refusal of sale or chain outlet devices. Such resale price protection based on protected vertical contracts does not constitute unlawful price-fixing or contracts in unreasonable restraint of trade, any more than the combining of thousands of retailers as consignment agents of a common principal constitutes an unlawful boycott or combination in restraint of trade to fix prices.

7. The contrary conclusion reached in *Miles* v. *Park, supra,* namely, that vertical contracts, in interstate commerce, with title passing and future sales restricted, are

contracts in restraint of trade but that vertical agency combines to attain the same result in a more expensive and oppressive way, are not boycotts or *combinations in restraint of trade,* is based (a) on a misconception of the rule against alienation and (b) on a failure to realize that trademarked goods are a very special kind of fungible or family-relationship property in which certain obligations and rights of the producer run with the goods and are inalienable wherefore such goods can lawfully be alienated subject to state-protected contracts setting up price restrictions on future sales.

8. Price maintenance on branded products is either good or bad, *per se.* If it is good, it is just as good when based on contracts protected against unfair competition, as on boycott combinations of consignment agents, and vice versa.

9. The direct economic consequences of the Miles-Park and General Electric rules holding that price maintenance by vertical resale contracts with passage of title is bad, but that price maintenance based on the boycotting of price-cutters by means of vertical combinations of consignment agents without passage of title or on refusal of further sales after passage of title, is good, have been appalling and disastrous.

10. Agency combinations unchecked by the competition of vertical resale protected contract systems, have converted a political economy formerly characterized by small capital producers, single unit wholesalers and one store retailers into a regimented economy of chain organizations and holding companies pyramided on chains of chains.

11. Not since the Dred Scott decision have such amazing, contrary, uncalculated and undesired results flowed from a judgment of this court as have resulted from the Miles-Park rule. If that rule is to stand as embalmed in the 14th Amendment and to be imposed upon the intrastate commerce of California and other states by vitiating Section 1½ of the Act in question, it can conservatively be predicted that the economic regimentation of the country will be completed within a few years.

12. The United States must take its position either for or against price-maintenance on branded goods, however effected and whether in interstate or intrastate commerce. Any middle ground will soon make a national economy pivoted on competition a thing of the past. A house divided against itself cannot stand—and a judicial policy that permits plutocratic forms of price maintenance when based on a refusal of further sales after title has passed or on a combination of thousands of consignment agents, stores, service stations or sales branches without transfer of title, but that prohibits democratic forms of price maintenance based on vertical resale price contracts with transfer of title and protection against nullification by strangers, will go down in history as the worst restraint of trade that has ever fastened itself on a modern nation, and the fact that this judicial restraint of trade comes from wrongfully classifying fungible or family-type trademarked goods under the rule regulating alienation instead of under the exception to the rule, as all other modern nations except Canada have done, will not mitigate the already appallingly serious consequence of the mistaken policy.

13. California, like Washington and other states, refused to follow the Miles-Park Rule, and its legislature has specifically recognized price-maintenance based on vertical resale price contracts protected against nullification by strangers as being just as lawful as when effected by boycott combinations of consignment agencies, chains or the like or by placing a servitude on goods already sold by refusal of further supplies if prices are cut.

14. Price maintenance limited to trademarked goods which are in competition with similar commodities produced by others under different trademarks or in bulk, having always been lawful in California and being now specifically legalized when based on contract, it is a mere exercise of the police power to declare that the same distinctively branded or trademarked goods in the channels of trade are subject to the servitude of such lawful contracts when held by strangers who do not wish to close out the line.

15. The legislation is within the power of the state, reasonably shaped to the end in view, not arbitrary, discriminatory or capricious and in every way in the public interest.

16. The principles of ownership and of free-contract should be restored to a parity under the Sherman Anti-Trust Act (U. S. C. Title 15, Sec. 1, July 2, 1890, c. 647, Sec. 1, 26 Stat. 209).

If producers and dealers can lawfully combine under the forms of ownership, holding company, agency or refusal of sales to standardize retail prices on trademarked goods (as they admittedly can), then the same producers and dealers should be able lawfully to accomplish the same result

by resale price contracts protected against the unfair competition of price-cutters.

To widen or liberalize the meaning of the term "combination" in restraint of trade in the Sherman Anti-Trust Act (*supra*), so as to adjudge that the vast congerie of mines, railroads, steamship lines, blast furnaces, rolling mills, distributing agencies and other devices for controlling all prices from the Mesaba Range to the final consumer all under the plutocratic control or ownership of the United States Steel Corporation, *is not a combination in restraint of trade* (*U. S.* v. *U. S. Steel Corporation,* 251 U. S. 417, 64 L. Ed. 343), but that the system or vertical resale price contracts between the comparatively small Dr. Miles Medicine Company and its otherwise independent wholesalers and retailers were *contracts in restraint of trade* (*Dr. Miles Medicine Co.* v. *John D. Parks & Sons, supra*) is:

a. to decree that chain stores, catalog houses and other price-cutters shall grow apace at the expense of small independent dealers who pay local taxes.

b. to force large capital producers to adopt autocratic, maximum capital schemes for keeping their goods out of the hands of price-cutters.

c. To reduce the Sherman Anti-Trust Act to a legal monstrosity as a breeder rather than a destroyer of trusts and restraints of trade.

The Great Atlantic and Pacific Tea Company, better known as the A. & P. Company, is the largest chain of grocery stores in the world.

A. & P. did more business in 1934 than the Ford Company, Sears Roebuck, Montgomery Ward, and the James Cash Penney stores combined. Its total trade was $819,616,727.

A. & P. has 90,000 employees, operates 16,000 stores, 52 warehouses, 39 produce, 12 meat, 5 fish, and 3 but-

ter plants, 40 bakeries, 6 salmon canneries, 9 milk plants, 9 general factories, 8 coffee-roasting plants, one printing plant and a fleet of fishing boats.

A. & P. is not a "combination" in restraint of trade, but resale contracts between the Dr. Miles Medicine Company and its independent distributors are unlawful "contracts" in restraint of trade!

These two results simply do not make sense. If the Miles-Park contracts are unlawful, but the Steel Corporation, the General Electric boycott combine and the A. & P. Company are not unlawful combinations, then the Sherman Anti-Trust Act has become the father of trusts, the most prolific breeder of combinations and restraints of trade that any modern nation ever enacted.

17. To place contract rights back on a parity with ownership, consignment, agency or refusal of sales rights under the Sherman Anti-Trust Act and the 14th Amendment, by recognizing that trademarked goods are in fact and in law a very special kind of property constituting an exception to the rule against alienation and thus capable of transfer alike in *interstate* and intrastate commerce in California under vertical contracts subject to automatic close-out, damaged goods and Court order sales, such contracts to be protected against the unfair competition of price-cutters, (a) would be an act of simple and much needed justice; (b) would restore the Sherman Anti-Trust Act to its real function as a foe rather than a breeder of trusts and restraints, (c) would once more place the monopolistic weapon of unfair price-cutting back where it belongs as a thing condemned rather than protected by the Sherman Anti-Trust Act and the 14th Amendment and (d) would once more place small producers and small distributors with their protected contract rights on a competitive parity with large producers with their destructive twin weapons of plutocratic and autocratic sys-

tems of price-protection and their monopolistic weapon of predatory price-cutting.

18. In all important foreign countries, except Canada, price maintenance on trademarked articles is just as lawful and good when based on protected contracts as it is when effected by agencies, consignment, or refusal of sales devices.

19. Price-cutting has been outlawed as applied to many similar forms of fungible goods and services in the United States, such as postage-stamps, railroad tickets, newspapers, magazines, insurance policies, stock exchange and other forms of brokerage, etc., without restraining trade or eliminating competition.

20. Section 1½ is the heart of the Act. If that be killed, the Act dies with it.

21. California has power and right to reject such a construction of the law as applied to its intrastate commerce.

22. The system of vertical resale price contracts relating to Max Factor trademarked products and protected against the unfair competition of price-cutters is not prohibited by the 14th Amendment to the Federal Constitution and is lawful both in interstate and in intrastate commerce in California and was lawful both before and after the passage of the California Fair Trade Act, the reasoning of this Court in *Miles* v. *Parks, supra,* to the contrary notwithstanding in so far as that reasoning might influence or affect either intrastate or interstate commerce in California.

ARGUMENT.

The demurrer concedes (a) that the Max Factor trademark-contracts in issue are lawful and enforceable in California and (b) that defendants' cut-rate practices will force plaintiffs' dealers to cancel the contracts to the injury of plaintiffs and their dealers.

The contracts being admittedly lawful, the 14th Federal Amendment guarantees to plaintiffs and their dealers the right to enjoy the fruits of these lawful contracts and both the legislative and the judicial power of California may be invoked to protect these lawful contracts against nullification by strangers or others acting to bring about a cancellation or nullification of the contracts.

Bitterman v. *Louisville & N. R. Co.*, 207 U. S. 205, 52 L. Ed. 171, 21 Sup. Ct. 91;

Angle v. *Chicago, S. P. and M. R. Co.*, 151 U. S. 1, 35 L. Ed. 55, 14 Sup. Ct. 240, and authorities cited in both these cases.

Assuredly the legislative and judicial power of California can be invoked to deprive the public of the transient if not illusory advantage of price-cuts on some well known or "loss-leader" items currently attended by overly-high prices on items of unknown value, especially where that practice, like other forms of monopolistic or unfair price-cutting, tends to eliminate small or independent dealers and in the long run to oppress the public by forcing it to deal with expensive and monopolistic chain organizations and the like.

This court in the two cases above cited deprived the public of bargain rates on tickets because such rates were immediately injurious to the railroads and, in the long run, to the

public. The tickets were fungible or family-type products controlled by the law of market price. Either the scalpers would mark down the price to an unfair level or the railroads had to be protected in marking up the price to a fair level.

Regular retailers operating under concededly lawful contracts which establish admittedly reasonable prices on trademarked goods, are just as deserving of protection under ordinary judicial, legislative and police powers as are the railroads. At least there is nothing in the 14th Federal Amendment which prohibits California from extending such protection to lawful contracts.

It is thought that on the basis of the admitted legality of the resale price contracts in issue, there can be no question as to the power of California to protect them as property or rights the enjoyment of which is guaranteed to plaintiffs and their dealers by the very 14th Federal Amendment on which defendant seeks to base his privilege of destroying or nullifying such lawful rights.

But, if it should be thought that the real question is not so much as to the power of California to protect legal contracts, but whether or not the contracts really are lawful and in the public interest and worthy of protection, we submit that a candid study of the reason, purpose and effect of the contracts shows that in intrastate and interstate commerce alike the contracts are in the public interest and failure to protect them against unfair competition would be against the public interest.

In short, the ruling in *Miles* v. *Park, supra,* was just as much against the public interest as though the Court in the *Bitterman* or *Ticket Scalper's* case, *supra,* had decided that the public was entitled to the benefit of cut-rate competition in railroad tickets, or even had made the ruling

which defendant asks it to make in this case, namely, that the contracts are lawful but that the cut-raters cannot be enjoined from nullifying them!

Trademarked or branded goods produced by the trademark proprietor and sold by dealers on his name, reputation and good-will in competition with commodities of the same class produced by others are and have long been regarded as a very special kind of property as to which the good-will and reputation of the producer inalienably run with the goods and to whom there is a constant possibility of reverter for defects, repairs or new supplies and by whom the goods are impliedly or expressly guaranteed. Such goods therefore in California have always been treated as an exception to the common law rule against alienation and susceptible to transfer under reasonable vertical price restrictions without violation of the rules or statutes against alienation and unreasonable restraints. *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745, and *Ghirardelli* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041.

Price maintenance on such special or trademarked fungibles is not unlawful *per se* even in interstate commerce but only when title to the goods is passed. The emphasis on the commercially unimportant rule against alienation or transfer of title has freed the goods but enslaved the formerly free dealers by making them into plutocratically and autocratically regimented agents selling branded goods at controlled if not

manipulated prices, all to the gross injury of trade and oppression of the public. This is the evil with which the legislature dealt in the Act in issue.

If the resale price contracts are valid, it does not seem to us that the question of protecting them against nullification by strangers presents much difficulty of solution. If California may lawfully recognize the contracts as valid, it may certainly protect them. The real issue concerns the validity of the reasons for treating the contracts as valid.

The special nature of trademarked or branded goods is dramatically emphasized by the almost incredible transformation in methods of doing business which have occurred as a result of the decision of this court in the case of *Dr. Miles Medical Co.* v. *John D. Park & Sons Co., supra,* which in effect held that retail price stabilization on trademarked or branded goods like Dr. Miles Medicines, was bad and unlawful if title passed, but good and lawful if title did not pass from producer to dealer; in short, that vertical contracts between the Miles Company and twenty-one thousand wholesale and retail dealers were in unreasonable restraint of trade when title to the goods was transferred in violation of the rule against alienation, but that, if title to the goods did not pass, the Miles Company could lawfully combine the same twenty-one thousand dealers into a vast consignment agency device under the autocratic control of the Dr. Miles Medicine Company to accomplish identically the same result by preventing price-cutters from securing supplies, in a manner much more expensive and oppressive both to the trade and to the public.

That judgment strained at the gnat of vertical price contracts on a branded product while swallowing the camel of vertical combination of the same group of thousands of wholesalers and retailers accomplishing precisely the same result of standardized prices for the Dr. Miles Medicines sold in competition with the remedies of Father John and other medicine companies.

The implications of the decision in *Miles* v. *Park* were followed out in *U. S.* v. *American Tobacco Company, supra,* in which the chain-store device represented by American Cigar Stores Company was recognized as legal. The policy was further expanded in *U. S.* v. *Colgate* (250 U. S. 300, 63 L. Ed. 992, 39 Sup. Ct. R. 465), in which horizontal price stabilization at wholesale and retail was recognized as legal when maintained on the Colgate branded products by refusal to sell the goods to price-cutters. Control over goods already sold was projected by the policy of refusing to sell new supplies if prices were cut on old supplies.

The *Miles-Park* decision was finally capped by the judgment in *U. S.* v. *General Electric, supra,* which specifically recognized the legality of a nation-wide combination of twenty-one thousand sales agents representing a common principal and charging dictated prices on Mazda lamps, the central purpose of the plan being to prevent any Mazda lamps from getting into the hands of price-cutters or other unauthorized dealers.

This almost incredible legal conclusion, namely, that price maintenance on branded goods, when based on refusals of sales, combinations of agents or chain-store devices, was legal both as applied to branded goods and unbranded goods, but that identically the same result was bad when accomplished by vertical contracts limited to branded goods in competition with other similar goods, grew out of an

undue emphasis laid on the old common law rule against alienation and of failure to recognize that branded goods fell under the exception rather than the rule.

It is safe to say that Lord COKE would have recognized, as the English judges since his day have unhesitatingly recognized, that an Ingersoll watch or a Ford automobile is a very special kind of a property to which the name, reputation and good will of the original producer are inalienably attached, running with the goods down to the final consumption of the product, with a constant "possibility of reverter" growing out of the fact that the trademark owner is praised for quality, blamed for defects, looked to for repair, spare parts or replacements and finally depended upon by both trade and consumer as the real promoter of sales and energizer of trade.

Since the *Miles-Park* judgment, a disquieting transformation has occurred in trade conditions within the United States, and in California, without any comparable parallel in other countries which regard trademarked goods as falling within the exception to the rule against alienation.

Three Competing Systems.

Before the *Miles* v. *Park* decision, there were three distinctly recognizable and highly competitive systems of marketing goods in this country, and all three of these competing systems operated through the medium of independent wholesalers and independent retailers.

1. The Unbranded System.

So-called bulk, loose or unbranded goods are things which are anonymously produced. No one cares whether

they come from one producer or another. Being unbranded or maverick goods, they must be sold on the reputation of the retailer who, if legitimate, advertizes himself, his integrity and his store rather than a particular product, its source of origin and the integrity of its producer. The public does not know the producer of bulk or unbranded goods. There are no price restrictions and no marks of origin. Differences in retail price are supposed to be caused by variations in inherent value. Such goods are ineffective as "loss-leaders" because there is no trademark to establish a standard of value and fungibility. The unbranded goods are sold by so-called "local", store or dealer advertizing rather than by "national", "product" or producer advertizing. Dealer advertizing usually goes into the local papers; product or producer advertizing usually goes into the national magazines and the like.

2. The Agency or Consignment System.

This system of merchandising was not confined to either branded goods or to bulk goods. The producer or manufacturer consigns the goods to wholesaler or retailer, retaining title in himself until the final sale to the public. This consignment system is largely devoted to new and untried articles which require expensive educational processes to introduce to the market. Wholesalers and retailers are unwilling to invest capital in these new goods of uncertain selling qualities. Therefore the producer assumes the risk by placing the goods on consignment with the trade and by allowing the dealers long profits to compensate them for their trouble in working up sales and educating the public in the use of the new razor, massage device or what not.

3. The Trademarked, Branded or Vertical Contract System.

After the trade and the public became educated in the use of new devices initially marketed under the consignment plan and when the devices were widely distributed so as to justify advertising in a national way, it was much cheaper for producer, wholesaler, retailer and the public to dispense with the consignment system and market the goods under the vertical resale contract system, relying on the producer's advertizing and reputation as the principal energizer of sales, rather than on any special sales effort of the dealer who is a mere neutral broker or agent of the producer in actual sales fact and substance even though he has bought and does own the legal title to the article. The dealer's function in selling an article which carries its producers' name and has his advertizing instilled into it to make it self-selling, is more like the function of a postman delivering a letter than a retailer working up or creating a sale on his own reputation as a retailer of integrity.

The manufacturer under the contract system of price-protection only had to have enough capital for his daily, weekly or monthly turnover. His capital was immediately replenished by selling his output to the wholesalers or jobbers who acquired title under agreements which restricted them to sell to retailers at uniform wholesale prices under contracts limiting the retailers to uniform and usually advertized prices to the public.

So long as branded articles are protected against competition by letters patent, their prices are based on the competition of conflicting desires. If a certain type of patented razor is regarded as overpriced at $5.00, the public will purchase a different make at $1.00, or at $2.00, or at 50¢.

As soon as patents expire on the popular types, the ordinary law of market competition begins to regulate the retail price. If the original patentee tries to hold his price too high, other producers will make the same article under different trademarks at lower prices. In the very week during which the patent on a well known type of razor expired the price fell away from $5.00 to below $1.00.

Competition Within and Between Systems.

As before stated, these three systems were operated concurrently through independent wholesalers and retailers. Some goods flowed anonymously at free prices from producer and wholesaler to retailer and public. If different dealers charged different prices the public assumed it was because of different qualities. There was no criterion of value. The same wholesalers and retailers were simultaneously handling other goods on a consignment or agency basis. At the same time these dealers were handling branded or trademarked goods on vertical resale price contracts.

If branded or consignment goods tended to be too high in price, the public turned to loose, bulk or unbranded goods backed by the integrity of the dealer, the producer being unknown. If consignment or agency goods sold under trademark were too expensive, the public turned to the next competitive article sold under the less expensive contract system. Competition between different brands under the vertical contract system was very keen because it was directly between producer and producer. The independent wholesaler and retailer were neutral channels of distribution, like post offices. They carried all makes of goods under different trademarks and under different prices.

Witness the tremendous price reductions and economies that have gone to the public through the expert but price-controlled competition between different producers of motor cars in past years. Rigid price-maintenance intensified rather than reduced the real competition between producers each controlling the price on his own trademarked car.

As to branded goods in the lower price levels, the competition was of the showcase or display shelf variety. A customer walked up to a counter and there on display was an entire line of razors from every important factory in the world, each distinguished by its own brand or trademark. There also were other standard makes of cutlery that were unbranded. Each producer was controlling his own trademarked products like regimented soldiers. If one make of article was overpriced at $5.00, customers turned to one just as good at $4.00, or if someone could make a satisfactory article at $1.00, all of his competitors had to meet that price or lose business.

Perhaps the outstanding example of the operation of the branded or vertical price contract system was the Ingersoll watch. The first watch cost approximately $52,000.00 to produce. The retail price was regulated by the ability of the producer to distribute the goods inexpensively throughout the country. So long as the total demand equalled only a few thousand watches per day, the goods could not be produced to sell at less than $5.00 or more per watch, but eventually the manufacturer increased his good-will and his distribution to the point where through the branding of the watch as an Ingersoll Dollar Watch and by having practically 100% distribution throughout the retail trade and by prominently advertising the Ingersoll name and the Dollar price until one was synonymous with the other, sales resistance was so completely broken down that it was pos-

sible to market many thousands of watches per day and thereby to sell this $52,000.00 watch at a One Dollar price, which included a fair profit for the producer, the wholesaler and the retailer, and which was also fair to the consumer because no competitive producer could better it.

This whole system pivoted on the sanctity of the vertical price contract. If any dealer could lawfully cut the price of $1.00, he would thereby mark down the retail price not only on his own stock but also on the stock of all other retailers in that market at that time, thus demoralizing the whole system, because other dealers who could only make a fair profit at the $1.00 price, would then put the goods under the counter and tell customers who expected to buy them at the cut price that they had none in stock. The dealer preferred this course to quarreling with the customer who expected to purchase a $1.00 article at a cut price.

These three smoothly working systems of merchandising, with competition operating between the three systems and also within each of the three systems, and all three systems working through independent competing wholesalers and retailers is still in existence in every important country in the world excepting only the United States and to a lesser extent in Canada.

The three competing systems do not work toward monopoly or the creation of chain stores, catalogue houses, price scapers and the like, but tend always to preserve the independence of one-store merchants.

These three systems were in existence and operating smoothly throughout the United States until around the turn of the present century.

Patent Infringement Price Systems.

New and high-priced patented goods could always lawfully use the consignment or agency system of maintaining prices, but the excessive burdens and expenses of that system, consequent upon the producer having to furnish not only manufacturing capital but jobbing, wholesaling and retailing capital as well, forced the producers of new and patented specialties, around the latter part of the last century, to stamp the retail prices on their goods and to pass title subject to restrictions which purported to convert price-cutters into infringers of the patent. The lower federal courts upheld the legality of these retail price systems based on patents in a series of cases.

There was nothing pernicious about this patent price system. It was inexpensive and abuses were prevented by competition between rival makers of patented articles or the competition of conflicting desires. The very success of the Gillette Safety Razor Company in holding the $5.00 price on its patented razors brought in a flood of competitive razors at every price range from $5.00 down to 25¢ for a very good razor made by Mark Cross of London.

The principal effect of a refusal by the courts to enforce this patent price system was to force the same articles onto a consignment or agency system with an added burden of expense falling ultimately on the public.

The Copyright Price Case.

The success of the patent infringement price system in the lower Federal courts aroused the emulation of publishers. Bobbs-Merrill Company published a book called "The Castaway" containing a notice that anyone who sold it at retail for less than $1.00 would be held as an

infringer of the copyright. The Constitution prohibits cruel and unusual punishments, and the defense of an infringement suit is an onerous thing.

The *Bobbs-Merrill* case came to this court (*Bobbs-Merrill Co.* v. *Straus,* 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086) which held in effect that the price-cutter was not a copyright infringer. The most astonishing thing about the decision was that this court referred to the fact, without either comment or condemnation, that R. H. Macy & Company was buying the "Castaway" in the open market at $1.00 per copy for the purpose of re-selling it at 89¢ a copy, a clear loss of 11¢ per copy on the purchase price, to say nothing of the approximately 30 or 35% overhead cost which represented a pure loss to R. H. Macy & Company in carrying out the expensive transaction.

It is safe to say that the old Oil Trust in its most predatory days never purchased oil at $1.00 a barrel for the purpose of selling it at 89¢ a barrel to injure its little competitors. It relied mostly on railroad rebates.

Secret Formula Price Protection.

Then came the crucial case of *Dr. Miles Medicine Company against John D. Park & Sons* (220 U. S. 373, previously referred to). The majority and the dissenting opinions in that case show that the argument at bar was principally concerned with establishing that the Dr. Miles branded or trademarked product in issue was made under a secret formula which was like unto a patent and thereby gave the producer the right to restrict the retail price on some sort of an infringement theory of projection of monopoly.

The court disposed of that argument pretty much as it

did the copyright argument in the *Bobbs-Merrill* case and of the patent infringement theory in later cases. (*Bauer* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041; *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 886; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871; *Boston Store of Chicago* v. *American Graphophone Co., et al.*, 246 U. S. 8, 38 Sup. Ct. 257.)

Trademark Price Protection is Either Good per se or Bad per se. There is no tenable middle ground.

Grave economic maladjustment flowed from this epoch-making case of *Miles* vs. *Park* due to the fact that this court recognized the validity, under the Sherman Anti-Trust Act, of the combination-consignment, agency or boycott system of standardizing retail prices but condemned the resale price contract system and refused to protect it by injunction.

It is earnestly submitted that wholesale and retail price standardization on branded or trademarked articles is either good or it is bad. If it is good, it is good whether it is established by vertical price contracts or by consignment, agency or boycott combines or by setting up wholesale depots for feeding the retailers from hand to mouth so as to maintain prices by cutting off the supplies of price-cutters. (*U. S.* v. *Colgate*, 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992; *U. S.* v. *A. S. Schrader's Son, Inc.*, 252 U. S. 85, 64 L. Ed. 471; *Frey & Son* v. *Cudahy Packing Co.*, 256 U. S. 208, 65 L. Ed. 892; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 66 L. Ed. 307.)

On the other hand, if retail price standardization on branded or trademarked goods is bad *per se*, then it is just

as bad when established by a boycott combination of consignment agents as by a system of vertical contracts. The result is the same so far as the public is concerned except that the agency systems are more expensive than the vertical contract systems.

The Sherman Act condemns both contracts and combinations in unreasonable restraint of trade. It makes no distinction as to whether the restraint is effected by combining together twenty-one thousand wholesalers and retailers as consignment agents of a common principal or by combining the twenty-one thousand dealers by means of vertical contracts.

The importance of the rule against alienation, as a trade fact, is truly chimerical so far as special fungibles like trademarked commodities is concerned. The public seldom knows whether title has passed from producer to dealer or not, and cares even less. The consignment system is much more cumbersome and monopolistic than the contract system and the public foots the bill.

The only difference between the contract, the consignment and the refusal of sales systems is wholly in favor of the contract system. The vertical contract combination can only be effected on goods which are branded or identified as coming from a common source by bearing a unique trademark. This vertical contract system is inexpensive, rides lightly on the pocketbook of the public, is highly competitive and invites little producers to operate because they only have to control manufacturing and advertizing capital and do not have to supply the vast amounts of capital required for consigning the goods to twenty-one thousand dealers with retention of title.

This good system of standardizing retail prices on

trademarked commodities by vertical contracts was condemned by this court in the *Miles-Park* case.

But the same court in the same case recognized the unquestioned legality of the system of maintaining retail prices *on either branded goods or unbranded goods* by a vast combination of agents on a consignment basis or by the use of chain store outlets, such as the shoe manufacturers, oil companies, and the like, employ.

The Effects of the Miles v. Park Case.

The direct and unavoidable result of the decision in the *Miles* v. *Park* case was that large manufacturers with sufficient amounts of capital to establish their own chains of stores, agencies or service stations or to consign their goods to thousands of retailers, took steps lawfully to protect the retail prices on their branded and unbranded goods by boycotting or withholding supplies from price-cutters through combinations of many thousands of selected dealers, but the little producers who were without sufficient capital for consignment purposes had to sell out or merge with large concerns or else have their sales cut down and their business injured by price-cutting.

The independence of the wholesalers was likewise affected by the *Miles* v. *Park* decision. Some of the big manufacturers took over the wholesale functions on their goods. The great collar and shirt manufacturers established wholesale depots in all of the principal retail markets, thus injuring the independent wholesalers and enabling the manufacturers to feed the retailers on a hand-to-mouth basis, so that anyone who cut prices today could get no more goods tomorrow.

The effect on the independent retailers was the most

disastrous of all, because the very forms of monopolistic or below-cost price-cutting which were condemned in the oil cases were legalized and approved in the *Miles-Park* case, and this thus legalized form of price-cutting has been just as disastrous to the independent retailer as it formerly was to the independent oil operator.

Miles v. *Park* started the country into a process of economic regimentation which, unless checked, must finally evolve into state socialism or something worse.

The effect on the public was bad, not only because merchandising gravitated to chain stores and metropolitan centers, but because the cost of doing business rose sharply, and the public had to foot the bill.

Combination Price-Cutting is Bad in All Its Forms.

Price Manipulation.

This court, in *Standard Oil Co.* v. *U. S.* (221 U. S. 1), severely and properly condemned the practice of the Oil Trust in selling oil low in competitive territories and high in non-competitive. That was recognized as price trickery or combination price-cutting. The Trust could only sell oil low in the "fighting" territory because that territory was combined in ownership with other territory in which the Trust was charging too much due to a condition of previously achieved monopoly. The small independents, having no combination of high price monopolized markets to counterbalance their losses in low price competitive markets, soon were forced to the wall. This might be regarded as checkerboard price-cutting.

A chain store is merely a checkerboard of markets drawn out into a chain under one ownership, not different in prin-

ciple from the checkerboarded markets of the Oil Trust. A chain system can convert first one store and then another into a "fighting store" to "meet local competition" and the nearby independents soon fold up because they have no distant stores in non-competitive territory from which to draw monopolistic profits to carry them through a price war in the competitive territory.

A department store is merely a chain of stores located under one roof, each handling a different kind of goods. A department store is admirably adapted for the same type of combination price-cutting which created the Oil Trust and the predatory chains. The department store successively eliminates its various one-store competitors in price wars. The china department, for example, is converted into a "fighting" department "to meet competition". Losses in the chinaware department are offset by profits from departments which have previously met and eliminated their local competitors. Single unit stores specializing in chinaware, having no other departments to offset their losses on chinaware, are soon eliminated.

Single unit price-cutting stores depend on their ability to play certain loss-leader-lines against higher priced lines of other goods. Bargain hunters are drawn into the city or downtown by flaming headlines and radio appeals. Then high-powered salesmen manage to sell them as little of the loss-leader goods and as much of the long-profit goods as possible. It's all very expensive merchandising but the public foots the bills and thinks it is being economical.

"Economies" Which Increase the Cost of Doing Business!

During the orgy of combination price-cutting which was legalized and stamped with judicial approval by the judgment of this court in *Miles* v. *Park, supra,* the cost of doing

business has steadily mounted from around 10% to around 30% of gross sales.

Price-Cutting Frequently Condemned.

Price-cutting on oil was condemned in *U. S.* v. *Standard Oil Co., supra.*

Price-cutting on railroad tickets was similarly banned in *Bitterman* v. *L. & N. R. Co., supra.*

Price-cutting was eliminated, in so far as refusal to sell goods to the price-cutters could eliminate it, by the judgment of this court in *U. S.* v. *Colgate, supra.*

Price maintenance effected by a chain of stores was legalized in *U. S.* v. *American Tobacco Co., supra,* by recognizing the United Cigar Stores Company as a lawful chain store device.

Price-cutting on Mazda lamps was eliminated by the judgment of the court in *U. S.* v. *General Electric, supra,* which upheld the legality of the consignment system of combining many thousands of dealers as agents of a common principal in order to refuse supplies to price-cutters.

This long line of wise decisions (a) against the practices of predatory price-cutting on oil by a combination of monopolized and fighting markets, (b) of protecting railroads against the impossible ordeal of trying to sell transportation at a high price when scalpers were offering the same transportation in the same market at a low price, (c) assisting those collar and shirt and other producers who were financially large enough to project their control over goods already sold by establishing their own local wholesale depots and thus keeping their dealers on a hand-to-mouth basis to prevent price-cutting by refusing supplies to the price-cutters or anyone who tried to supply them, and (d)

legalizing the enormous combination of sales agents by which the General Electric Company prevents all price-cutting on its Mazda lamps (both (c) and (d) constituting Ulysses' bows which small capital producers could neither hold nor bend), is only marred by the judgment of the court in *Miles* v. *Park, supra,* which, in effect, legalized and approved the principle of price maintenance on branded goods when erected and maintained by a maximum capital boycott combination of agents bound to a common principal, so that no title to the goods passed until the final sale to the public (*i. e.,* the General Electric Mazda Lamp plan) but legalized and approved the practice of loss-leader or combination price-cutting by refusing to approve the small producer's and small dealer's minimum capital device, namely, the vertical resale price contract which is legalized and protected in the California Act here in question.

Price-Cutting Chain Organizations Grew Apace.

For a few years after the decision of the Court in *Miles* v. *Park, supra,* national manufacturers of trademarked goods whose products were handled in approximately 100% of the retail stores and who thus could not select a mere twenty-one thousand or so elite agents for a consignment or boycott system of retail price protection, endeavored to combat the chains by serving as champions in the movement to have the Federal Congress remove the barrier which this Court had raised against the vertical resale price contract system in the *Miles-Park case.* No one has ever claimed that it would require a Constitutional Amendment to remove that barrier. The amazing and disastrous results which have flowed from it, show that the barrier ought never to have been raised at all—at least unless all forms of price-maintenance were to be equally condemned.

The chain stores and the other combination price-cutters grew so fast and large under their privilege of legalized combination price-cutting that they drove many independent stores to the wall and reopened them as chain units. They so hypnotized the public into the belief that the high-priced stores were selling goods cheaper downtown than their little competitors uptown or out in the country could do that the producer champions of the contract-price-system soon faded quietly into the background and later began to curry favor with the big chain store systems by making them advertising, quantity discount and other allowances which in effect gave preferential discounts or secret rebates to the big chains and price-cutters as against the little one-store dealers.

In short, national producers who could not protect their trademarked lines from price-cutting by using consignment systems, chain outlets or refusal of sales devices found themselves selling the chain store systems at prices too low and averaging up their gross receipts by selling the little independent dealers at prices too high.

Maximum Capital Economics.

This differential in purchasing power gave the big chains a further margin of profit to be passed on to the public in further cuts on loss-leader and other lines to hasten the elimination of the small dealers by the big combined ones.

The whole scheme—chains grown bloated on legalized price-cutting and increasing their edge over little competitors by grossly unfair discriminations in buying power, due to their vast size, constituted what may be called *a maximum capital economy.* The concern with a large capital could always outreach and undersell the concern with

smaller capital. Big concerns automatically grew bigger. Little concerns tended automatically to grow smaller.

As a system of evolutionary socialism it was fine. As a system of economic democracy it was rotten.

This whole matter of discrimination as between customers deserving of equal treatment by overcharging the little dealers so as to be able secretly to undercharge the big dealers had all been fought out and settled as railroad policy, but it had to be threshed out all over again in private business with the result that the Clayton Act (U. S. C. Title 15, Chap. 1, Sec. 13, Oct. 15, 1914, C. 323, Sec. 2, 38 Stat. 730) was passed to prohibit discrimination in price as between different customers under similar circumstances.

After the Clayton Act had been whittled down by various legal subtleties, the Patman-Robinson Act (An Act to amend Section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes", etc., approved June 19, 1936, U. S. Public Acts 1936, No. 692, 74th Congress, 2nd Session, H. R. 8442) was passed to deprive wealthy distributers of the secret rebates, allowances and discriminations which they had been extorting from producers at the expense of little purchasers because they had waxed so great on the price-cutting practices legalized and approved in *Miles* v. *Park, supra.*

These developments caused directly by the *Miles-Park* judgment are so contrary to the purpose of the Court and so injurious to producer, dealer and public alike that the Court should take judicial notice of them, or, if they be questioned, they are matters concerning which proof could be supplied if the case be not disposed of by affirmation on demurrer.

Three Legally Forged Weapons for Driving Small Dealers to the Wall.

Here then were three legally forged weapons for eliminating single-store standard-price-retailers and fostering chain stores, consignment combines, refusal-of-sales-systems, and expensive cut-rate department stores, catalog houses, and price-wreckers:

First.—Automobile, lamp, shoe, oil, shirt, collar and other manufacturers and producers with large enough capital resources, cut out the formerly independent wholesalers, retailers and salesmen entirely and established their own autocratically controlled chains of consignment, franchise and sales agencies and refusal of sales systems. This alone caused a devastating change in lines of business formerly open to independent dealers.

Second.—The monopolist's weapon of combination-price-cutting, legalized by the *Miles-Park* ruling in all lines of business where it could not be prevented by the establishment of producer-controlled combines as enumerated above, caused a further elimination of one-store retailers and dealers and a tremendous growth of distributor-controlled chains.

Third.—Sheer size and buying power resulting from predatory use of combination-price-cutting by the chains enabled them to extort discriminations and price concessions from the producers to be used for further price onslaughts against the few remaining small dealers—the whole amazing phenomena having no comparable parallel in countries which permit trademarked price maintenance to be established by legally protected vertical contracts the same as by consignment, agency or refusal of sales devices.

It is earnestly submitted to this honorable court that the result reached in the *Miles-Park* case is untenable in

logic, in law or in public morals, and the trade processes which have been traced show that the principle of permitting price stabilization by expensive agency, consignment, refusal of sales, or chain store, or service station devices, while condemning small producers and independent dealers to the ruthless and destructive effects of price-cutting by refusing to legalize inexpensive resale-price contracts protected against nullification by unfair competition, is practically the largest factor which has upset the economic equilibrium of the country and started us on the maximum capital road to ruin.

If this court shall embalm the *Miles-Park* rule in the 14th Amendment to the Constitution of the United States by declaring against the validity of Section 1½ of the California Act in question, the court will have doomed small producers and dealers to eventual extinction and will have continued to create quasi-trusts (a) by giving wealthy producers powerful agency or ownership weapons of price protection, (b) by giving wealthy distributors and chain stores the monopoly weapon of legalized price-cutting, (c) by encouraging the practice—now unlawful—of secret rebates or (d) of evading the operation of the anti-rebate acts by further combinations of producer and dealer organizations.

The Real Issue.

It is respectfully submitted that the issue presented to this court by the California Fair Trade Act cannot be resolved by recourse to the rule against alienation but must turn on the question whether trademarked price maintenance *per se* is condemned or permitted by the Constitution. If twenty-one thousand Mazda lamp dealers can lawfully

be combined for the sole purpose of preventing a few price-cutters from getting any Mazda goods to sell at cut prices (and this court has held that they can) then nothing in the Federal Constitution can inhibit California from reaching the same result by holding that the same price-cutters can be enjoined as unfair competitors from nullifying a vertical resale price combination of the same twenty-one thousand dealers.

The two methods are both either good or bad. Only economic regimentation or chaos, either or both, can come from endeavoring to hold that one result is good and the other is bad.

Price maintenance on branded fungibles is either good or it is bad. There is no middle ground. It is *per se* either a bad thing, an unlawful restraint of trade, injurious to the public, or else it is a good thing and not prohibited by constitution, statute or common law, and open just as much for the protection of the little producer and publisher by protected contracts as for the big manufacturer and chain store man by regimented agencies.

If price maintenance on branded fungibles is good and in the public interest and not an unreasonable restraint of trade and not an unlawful price-fixing device, then it is just as good when erected on contracts protected against the depredations of strangers as unfair competitors (Secs. 1 and 1½ of the Act in question) as it is when erected on vast maximum capital devices such as refusal of sales, chain agencies and consignments.

The protected contract system is essentially preservative of independent retailers. Destroy the contracts or their protection against nullification by price-cutters and you destroy the independent dealers.

The Three Systems, the Unbranded, the Agency and the Protected Contract Systems, Are Absolutely Essential to a Free Economy.

When a manufacturer puts out a branded or fungible product at an advertised price, he has to take into consideration so many different elements of possible competition, that it is impossible for him to make an unfair price and remain long in business or injure anybody except himself. His price on his special trademarked product must meet five rigid tests. First, it must be such a price as will appeal to the consumer, else the consumer will not buy; second, it must satisfy the distributor, else he will not distribute; third, it must satisfy the manufacturer, else he will not manufacture; fourth, it must be a competitive price so far as all other special brands of goods are concerned, else his competitors will take the business away from him; fifth, it must be a competitive price so far as all unbranded goods are concerned, else the latter goods will sell in its place.

Every price that is made by every manufacturer under these three systems must meet those five tests, and it is a practical impossibility for any manufacturer to remain in business for any length of time if he violates any one of the tests, because any one of those elements can put out of business a manufacturer who insists on an unfair price: The consumer alone can put him out of business by refusing to buy; the distributor alone can put him out of business by refusing to distribute, and in this case the producer's

only recourse would be to hire his own agents; and finally, his competitors under either the branded or the unbranded systems can put him out of business by offering better quality at the same price, or the same quality at a lower price.

Destruction of the Protected Resale Contract System Destroys the Independent Distributor System.

Now, these three competitive and self-checking systems are absolutely dependent for their existence on the enforcement of protected price contracts on special fungible or branded products. If the courts legalize, enforce and protect these contracts there will be three systems. If the courts refuse to enforce these contracts, then in the end there will be only one system, namely, the agency system, and that eventually spells a regimentation which is hardly short of socialism—presenting at least its bad factors without its good.

It is not frequently realized that when the contract system is destroyed, the ultimate doom of the unbranded system is likewise sealed. With these three systems in competition with each other, each different type of goods finally gravitates into that system under which it can be most cheaply distributed. Thus, goods which have been standardized by all makers drift into the unbranded system. Goods which can be sold to the best competitive advantage by the contract system gravitate into that system. Finally, special goods which always require the agency system will fall under that heading.

But when the contract system is struck down, it ultimately carries with it the unbranded system. When the contract system is eliminated, the competitive advantage is thrown in favor of the financially large distributors and the

financially large manufacturers, and when the inevitable result of that competitive advantage, namely, the existence of manufacturers' agencies and of chain stores, occurs, then there is no longer competition either in branded goods or in unbranded goods and these plutocratic distributor's and producer's systems tend to merge. So long as the independence of small retailers is preserved by means of contracts, they can compete with each other in the sale of unbranded or bulk goods and in the selection of different kinds of branded goods, but when the law has forced those independent distributors to become hired agents of great manufacturers or chain-store systems, then there is no longer price competition in either the branded or the unbranded goods. This is a very serious argument in favor of the validity of Section 1½ of the California Act here in question for checking the present alarming tendencies toward vast aggregations of capital for manufacturing and distributing goods, with their tendency to merge. If independent dealers are protected against predatory price-cutting they will continue to exist; otherwise they will be supplanted by various kinds of chain systems.

Just as the destruction of the contract system means the ultimate destruction of the unbranded system, so the enforcement of protected resale price contracts on special fungible products means the existence of the unbranded system, because the contracts leave the independent distributors free to buy and sell different branded and unbranded products in competition with each other.

Surely, if the court in the *Miles-Park* case had realized the full effects of its decision, if it had realized that the destruction of the contract system meant the ultimate destruction of the unbranded (or independent retailer) system, its decision would have followed the line of the minority rather than the majority opinion.

California has elected to retain the three competing systems which depend upon the preservation of free, independent, one-store dealers by means of resale contracts protected against unfair competition. The 14th Federal Amendment does not prohibit this.

California has elected to eliminate those forms of predatory price-cutting which injure or destroy small dealers and which cannot be prevented by setting up lawful but expensive or maximum capital systems of agency, consignment or refusal of sales. In short, small capital producers and small or one-store dealers are permitted to employ the protected contract system, and it is not seen how the 14th Amendment, which concededly does not prohibit the expensive agency, consignment or ownership systems, could possibly prohibit the inexpensive protected contract system.

The Act Relates to Special Fungibles.

Why Price-Protection Is Necessary on Trademarked Goods.

From the earliest times the Roman and other systems of law have recognized the clear distinction between fungibles and non-fungibles.

The Century Dictionary and Encyclopedia defines a fungible as follows:

"Fungible . . . a. and n. . . . .

I.a. Capable of being replaced by another in respect of function, office or use.

II.n. In the Civil Law, a thing of such a nature that it may be replaced by another of equal quantity and quality; a movable which may be estimated by weight, number or measure, as grain or money."

Horses, or cows, of varying individual merits, are examples of non-fungibles. If sold or borrowed, the delivery or return of the particular animal is required, and no substitute would be regarded as fungible or just as good. Such articles can sell at varying prices at the same time because each unit has an individual value.

Fungibles are dealt in by weight, number or measure but non-fungibles are dealt in by individual unit on a sort of *sui generis* basis.

Articles produced under a trademark or brand are by their very nature what may be called *special fungibles.* A new book of a certain edition or a new Ford motor car of a certain year's model and type is precisely fungible to all other new books of that edition or new cars of that model and type. All these Ford cars are as nearly alike as the processes of modern manufacture can make them. A customer chooses his model and type from a sales sample in a show room. He does not expect, without special contract, to receive the car he inspects, but merely another car like or fungible to it. So with Ingersoll watches, Squibb's Aspirin, or Gillette Razors. All these articles are made as identical in design and quality as possible. Each one is fungible to its fellows under the same trademark or brand.

Many and various other examples of modern special fungibles can be given, and it makes no difference whether the value lies in the thing itself or in the service or value it represents. Thus a share of Steel Corporation stock of a certain class or grade is fungible to all other shares of the same corporation of the same class or grade. A railroad ticket issued for a certain trip of a certain class over a certain railroad between certain points is fungible to all other tickets of the same road for the same ride. So with

theater tickets to a certain performance for a certain night. The price groupings are based on fungibility.

Postage stamps of a certain issue for a certain amount are fungible to all other stamps of the same issue and denomination.

Books of a certain publisher under his imprint and of a certain issue are fungible to all other books of the same issue under the same imprint.

The Fair Trade Act in question relates not to non-fungibles—not to horses, cows, bulk potatoes or loose milk, but merely to things the units of which are made fungible or standard to each other by bearing "the trademark, brand or name of the producer, owner, grower, baker, maker, manufacturer or publisher."

The uniform price for trademarked goods is dictated by their fungibility and by the so-called law of market price which is formulated as follows:

There Can Be Only One Price for the Same Thing in the Same Market at the Same Time.

This phenomenon is called a law because it always operates due to the fact that no sane or normal seller will accept any price higher than the highest price offered for the thing he is selling in that market at that time, and, similarly, no sane and normal buyer will pay more than the lowest price at which the thing he wants is offered at that time in his market. Moreover no trader will submit to being undersold in the same market on the same article at the same time with the same kind of customers.

The same things may have different prices at the same time in different markets, or in the same markets at different times, or different prices may prevail for different makes of similar things in the same market, but where (a)

the things are the same (b) the market is the same and (c) the time is the same, then only one price can prevail because no seller will accept less and no buyer will offer more.

Sometimes markets may differ in size. People in shopping for one kind of thing will not go further than the corner store but with other things they will travel for miles. The market for one thing may be geographically small and, for another, large. But whether large or small the market for each thing is a relatively definite area, and in that area that thing will fetch only one price at a certain time, if its absolute fungibility is attested by the trademark or brand of the producer.

The act in question, therefore, is limited by its terms, to things which, because their fungibility, their sameness of quality and make, their standardization of value, is attested by the trade-mark, brand or name of the producer, can sell only at the same price in the same market at the same time, and the real and substantial dispute between the plaintiffs and the defendant is whether the uniform price at which plaintiff's goods whose fungibility is attested by the trade-mark, must necessarily sell at a certain time in the market, shall be a price set by the brand-owner or shall be set at this level or that by competition between different dealers selling the trademarked goods at prices dictated by the principle of taking losses on some goods to lure customers who can be overcharged on other goods of unknown value.

The producers do not care what prices the dealers charge for non-fungible goods, but they insist on their right by contract to stipulate the price at which different retailers shall sell trade-marked fungibles.

Price-cutting or unregulated competition in the resale of branded fungibles injures the producer in either or both of two ways:

a. Where the article is expensive, like a motor car, and must be sold by specially trained men, price-cutting demoralizes the sales force as will presently appear.

b. Price-cutting also interferes with the wide physical distribution of trademarked articles, because many dealers are unwilling to handle or push an article which is being slashed by the price-cutters.

It is because of the grave damage done to the business of the trademark or brand owner and to the small or independent dealers and to the public by reckless price-cutting that various legal means have been worked out to prevent unregulated price competition in branded articles. A few examples of these plans for protecting fungibles against injurious price-cutting will be helpful in clarifying the subject.

Prices Are Maintained on Newspapers and Magazines Which Are Special Fungibles.

The resale prices on newspapers and magazines are not cut. The prices are always rigidly maintained without injury to the public. If, for instance, the publishers of the New York Times were to permit retail price-cutting, that paper would vanish off the regular newsstands almost over night. Price-cutting stores would offer the "Times" free to each purchaser of such and such a quantity of other goods, and the newsdealers who depend on regular profits, would be able to sell so few copies in competition with the gift or premium price-cutters that there would be no incentive to carry the paper in stock for sale in the regular way. Therefore the newspapers and periodicals maintain a rigid resale price policy and any dealer who sought to offer a three-cent paper for one cent would instantly find

his supplies cut off. Owners of trademarks on national fungibles grow ironical when they read editorials denouncing the Fair Trade Act in metropolitan newspapers which cater to large price-cutting interests and yet maintain the strictest resale price policy on their own newsstand sales, standing prepared to cut off the supplies of any newsdealer so iniquitous as to cut the prices on their fungible product.

Prices Are Maintained on Postage Stamps Because They Are Special Fungibles.

The Federal Post Office Department finds nothing oppressive to the public in the maintenance of a strict resale price policy on postage stamps. Title 39, Chap. 9, Sec. 363 (R. S.) § 919 enacted by Congress prohibits the sale of postage stamps except at par. The Post Office knows that if price-cutters were permitted to give away stamps as premiums, the wide distribution of stamps in stores and the like would vanish. No wise storekeeper would care to charge for stamps which the price-cutters were giving away as premiums to lure customers down town. And so the little shopkeepers, rather than run the risk of being regarded as overchargers, would simply cease to carry stamps at all.

If price-cutting is such a fine policy on other fungibles why does not Congress permit it on stamps? Price-cutting would harm the sale of stamps and it harms the sale of other trademarked articles in the same way.

Other Special Fungibles Are Price-Protected.

Nor are the problems of salesmanship any different when applied to life insurance or sales of stock or railroad tickets, than when automobiles or electric motors are in-

volved. Highly trained salesmen are needed in the sale of insurance. Such corps of men devoting their lives to the sale of insurance could never be maintained if price-cutting were permitted. One salesman would not take the time to work up a sale of a certain policy in a certain company if at the last minute a price-cutter could steal the sale by splitting his commission with the insured on the same policy in the same company.

Therefore, the various States have enacted criminal statutes to prevent the cutting of prices on insurance. All of the policies of a certain type in a certain company are fungible to each other—and only one price can be maintained for each type of policy of the same insurance company in the same market at the same time. Price-cutting or premium-splitting would demoralize the ranks of insurance men and injure the companies and the public as quickly as it demoralizes the retail dealers who sell branded or trademarked products or the railroads where price-cut tickets are concerned.

Stock exchange brokers and advertising agents likewise are offering what may be described as a fungible type of service in the purchase or sale of stock or advertising space. Their commissions are rigidly fixed so as to prevent price-cutting demoralization or competition based on price-inducement rather than service.

This Court Has Previously Protected Lawful Contracts Against Injury by Unfair Competition.

Railroad tickets may be called personal contracts but they are also physical commodities and were once dealt in freely by many dealers known as ticket scalpers. It was recognized as axiomatic that one ticket for a certain passage

on a certain railroad is fungible to another ticket for the same ride. The law of market price made it quite impossible for a railroad ticket office on one side of the street to charge a scheduled price for a ticket where precisely the same ticket and ride was being sold across the street at a cut price. In this instance it was the Supreme Court itself which applied the remedy of protection against unfair competition to this impossible situation. No statute was enacted as was done to stop price-cutting on insurance. The Supreme Court made its own statute. It issued its injunction (*Bitterman* v. *Louisville & N. R. Co.*, 207 U. S. 205, 222, 224, 52 L. ed. 171) against the transportation sold by price-cutters.

The theory of this equitable remedy as worked out or invented by a court of equity was precisely the theory embodied in the Fair Trade Act in issue. The court found that the contracts between the railroad and its passengers were lawful contracts and that the ticket scalpers as strangers were nullifying the contracts and competing unfairly with the railroads by dealing in price-cut return tickets—and the court enjoined and suppressed the scalpers.

Books Are Special Fungibles Controlled by the Law of Market Price.

Books of the same publisher and edition are just as fungible to each other as are tickets of the same railroad for the same ride or identical policies in the same insurance company offered by one agent at a cut-price to take a sale away from the salesman who really worked it up.

Surely there could be no keener competition than that between the publishers of different books or the makers of

different motor cars but such competition has always been on a strictly maintained retail price basis. Defendant may try to confuse this fact by claiming that allowances on used cars are like price-cuts, but the truth is that if one salesman works up a sale for a certain car on a certain used car allowance, no other salesman of that company would be permitted to steal the sale by offering a larger used car allowance on the old car.

Motor cars are sold strictly on a basis of no competition between dealers handling the same make of car. This is no more truly to be regarded as a restraint of trade or as a form of "price fixing" in violation of the constitution, than are the maintained retail prices on books, newspapers, periodicals, or postage stamps, or the standardized and uncutable commissions imposed on stock-exchange, insurance or other brokers.

In the case of insurance and automobiles the competition is keen. Each company is competing with other companies, but the salesmen are prohibited from cutting prices or commissions as between other salesmen of the same company.

Surely a department store or other local price-cutter, under its theory of being a purchasing agent for the public, should no more be permitted to cut prices on trademarked fungibles than are the insurance agents, stock brokers or ticket scalpers or others who are dealing with fungible values or services of various sorts. If stock brokers, insurance agents or branch post offices were permitted to cut prices or to make prices or commissions depend on the competition of the market, there would be just as much demoralization, trickery and restraint in these lines as now exists in the distribution of branded or trademarked fungibles, at least in those lines which cannot be pro-

tected by expensive consignment, agency or refusal of sales systems for boycotting the price-cutters.

There is nothing either new or strange or oppressive to the public in systems of resale or retail price-standardization as applied to various fungible values, and these are not regarded as prohibited or unconstitutional forms of "price fixing".

On the contrary, price-cutting as applied to fungible values like brokerage, insurance, postage stamps, railroad tickets and the like has been recognized as an unmixed evil to be suppressed by use of the police power through equitable injunction or by statute. The defendant here has no more vested right in the privilege of price demoralization on branded fungibles like Max Factor products, than did the ticket scalpers have in the privilege of selling tickets at cut prices. No more property was taken in one case than in the other.

On the case as pleaded the defendant admits that he bought the trademarked goods in issue after the contracts were made and with knowledge of the restrictions on his alleged right of resale imposed by those contracts, if the lawmakers acted within their power.

In the instances referred to it was found that indiscriminate price-cutting on fungible values was demoralizing and uneconomic. If permitted it would drive postage stamps out of general circulation and confine their sale to branch post-offices. It would drive newspapers and periodicals off the newsstands of all but those owned by great chains and monopolists.

Price-cutting on taxicab fares would soon drive the independent taxicab off the streets. The insurance business could not long survive a policy of premium price-cutting. Only tricksters would dare embark in the business.

Legalistically or metaphysically considered, these various businesses with their standardized price systems could be sorted this way or that under the principles of private contract, public regulation or the police power but they are all good examples in an economic sense of the same thing, namely:

> the inexorable operation of the law of market price on a fungible thing, value or service.

The feature of fungibility is present in every instance and that means that there can be only one price for the same thing in the same market at the same time. If one agent cuts the price of a certain "policy" on insurance in a certain company in a certain market at a certain time, other agents must meet or better that cut or be driven out of business.

Foreign Practice.

In matters of trade, business and distribution, the leading European nations have had centuries more of experience behind them than we have had and they have long adopted and maintained the practice of price-standardization of fungibles not only in all the lines of business and practice previously mentioned but in the distribution of merchandise under trademark or brand.

In England, France, Germany, Spain and other important countries, cutting the prices on trademarked, branded or other special fungibles in order to attract trade in the identical things away from other dealers is banned. The cutting of a price on a trademarked article or so-called "proprietary" is a police court offense in some countries. In Spain by statute, the trademark owner merely stamps his price on his goods and it follows the article through all the

channels of trade. The same result is reached in effect elsewhere. No restraint of trade results.

In England there is a well-established association known as Proprietary Articles Trade Association, called for short, "P. A. T. A." Owners of trademarks or brands are eligible to membership and if a dealer cuts a price on one proprietary all the other members legally can refuse to sell him any of their goods. This is apparently a substantial extension of the forms of "boycott" price maintenance which are legal in the United States but it does not in practice work a restraint of trade. It merely bans an injurious practice. No prices are cut and the little dealers have not been driven out of business by an unhealthy growth of retail chains on one hand and producer chains on the other or by general price demoralization.

We cite this instance of the British P. A. T. A. principally to show that in foreign practice it has long been demonstrated that there is nothing of a monopolistic, restraining or oppressive character involved in the practice of permitting the producers of proprietaries, trademarked or so-called branded articles rigidly to control the retail prices on their own fungible goods. Each branded article is in the keenest possible showcase or other competition with all the other products. Carter's Little Liver Pills, for example, are always in strong competition with other remedies.

The price set by the producer on his proprietary or fungible product must always meet rigid tests which absolutely insure the maintenance of fair competitive conditions.

Names or brands do not constitute a monopoly. Everyone can choose some kind of a trademark and embark in the manufacture and sale of a branded product, and whenever the branded fungibles in a certain line tend to be

overpriced, the public will quickly turn to bulk or unbranded or competitive substitutes.

The chief difference between foreign and domestic trade in proprietaries or fungibles is that abroad the costs of retailing have not soared up from approximately 10% to approximately 35%, as they have in the United States in certain lines under the malign effects of indiscriminate price-cutting on trademarked or loss-leader goods by great chains and department stores which are draining the economic life blood of the outlying districts down into the great metropolitan centers.

The large price-cutters like to talk about handing on the "economies" of their gigantic downtown stores with large real estate investment, high rents, appalling taxes, expanded wages, tremendous overhead and fantastic advertising, to the consumer, but the plain every-day facts are that when people used to give their fair volume of purchases to their little independent local tradesmen, the cost of doing business in many lines was as low as ten cents on the consumer's dollar, whereas the demoralizing practice of using standard brands as "loss leaders" to mislead the public about values and to lure them away from the local stores with their low rents, small taxes, inexpensive clerk hire and modest circulars and attract them down to great metropolitan shopping centers, has added a sheer twenty-five per cent. onto the cost of doing business, and the public must pay this increased burden.

Loss-leader price-cutting on trademarked or branded articles gives people a false idea that their local dealer who is charging the regular retail price is overpricing the proprietaries and other goods as well. The fantastic price manipulation downtown (price-cutting recently sent the

price of the Modern Library regularly sold at one dollar down to 9 cents) since the turn of the century, has skimmed away all the cream of the trade from the low-cost neighborhood and country stores. Shrinking volume of trade has left them still with their old expenses of rent, taxes, etc., but has driven up their cost of doing business by imposing all their expenses on only those comparatively few purchases which a deluded public still makes at the independent neighborhood stores. By driving up all costs of doing business, the price cutters of trademarked goods are enabled to slide their own high prices onto a public which falsely believes it is a beneficiary of new and modern economies.

Those mounting costs of doing business accompanying the practice of using trademarked, standard or fungible values as loss-leaders are the answer to any claims of economies based on price-cutting, and if these plain economic facts are not conceded as matters of general knowledge on this hearing, the case should be remanded for general proofs—so as to put flesh and blood on the bare legal skeleton presented by the demurrer—before, in short, the Court should assume *in vacuo* the unconstitutionality of an act aimed at undeniable economic evils.

Abroad, where price-cutting and use of proprietaries as loss leaders is not permitted, the total volume of business is still fairly distributed. The local stores still have both the cream and the milk of the business instead of being left to cater merely to the skimmed milk of the trade, and the cost of doing business has not risen to towering heights through fantastic methods of advertising and price manipulation of standard values.

Bargains may be had abroad but not in trademarked or fungible value goods, and great metropolitan, chain store

and catalog advertisers and price-cutters have not been permitted to wreck the national or standard system of producing branded articles and distributing them everywhere for sale at standardized prices through independent or one-store dealers.

Foreign Practice as to Price Maintenance on Books.

The book trade in its argument for price maintenance or branded articles has back of it the experience of over a hundred years in Europe, where one country after another has adopted the uniform price method—Germany, all the Scandinavian countries, France, Holland, Czechoslovakia, Italy, Spain. The last country to adopt the plan was Great Britain, in 1899.

All of the countries look upon price standardization as the only possible basis for national distribution of books. In England it is regarded as the cornerstone of the industry. When the new nation of Czechoslovakia was organized, a complete set of rules for the industry was outlined and approved by the government, and the whole basis of this was uniform prices throughout the country, with no increases and no decreases from the level set by the producer. England was converted to the idea after a half century of argument and has never wavered in its belief in its importance and social significance.

It is to be noted that no one in this country has ever considered that book prices in Europe were high because of uniform prices; in fact, students of the commerce in books believe that the wide distribution made possible by confidence in the price level brings about the distribution that makes Europe greater users of books per capita than America.

The retail or newsstand prices of newspapers are absolutely fixed both in America and abroad. Many magazine prices are absolutely uniform, and the cutting off of supplies has always proved an easy way to discourage price-cutters. Magazine subscriptions are fixed by the publisher and lower prices are offered only in such cases as advance subscriptions.

Society as a whole benefits from uniform or standardized prices. Textbook prices are fixed by contract with the states which buy them. Such contracts provide that prices paid by one state shall be no greater than those paid by other states and certainly never any less, because that would infringe the contract binding in other states. Thereby uniformity is accomplished but competition in real book values, namely, in the contents, is stimulated, just as it is with newspapers and magazines.

In low-priced books, far and away the best purchase and the greatest book value available is that made possible by the fixed price system of the ten-cent stores. They do not produce their own books but they would cease to handle them if anyone cut the price elsewhere below ten cents.

Without the huge distribution through these great outlets the ten cent price on books as fine as these ten cent books are, would be im· ossible.

The same is now true of the books in the twenty cent level.

This is one indication of the fact that society gains by uniformity of price which makes possible wide distribution. Wells' "Outline of History" was another example. It was published at first in two volumes at $10.50. Some price-cutters sold this edition at $7.79, and argued that this was a great saving to society, but it was the subsequent sale of the book at a uniform price that permitted the issuing of a $5 edition, and that made way for the final $1 edition, which was

one of the greatest bargains ever offered the public. It was not price cutting from $10.50 to $1 but increased market that permitted the lower prices. There is where society's interest really lies.

The Act Is a "Trade Act" Rather Than a Property Alienation Act.

Defendant apparently sought to present the case below as though the Max Factor products he owned were private property of a nature not affected with a public interest and that the Legislature had endeavored to prevent him from selling his property except at a price arbitrarily fixed by other dealers.

This is not the case. The statute in question regulates the trademarked goods only while in the regular channels of trade. Defendant can close out his line of Factor products at any time, for any reason and at any price he pleases to charge.

All that the Fair Trade Act does is to regulate trademarked products in the regular course of trade. It is a trade-regulating act rather than an act changing the right of alienation of property after it has left the regular channels of trade. The Act has to do with dealers buying goods for resale, and the goods are restricted only so long as they are regularly in trade. Even a regular dealer under contract can convert the goods into ordinary property, so far as he is concerned, at any time by a close-out sale or under a court order or when the goods are damaged or deteriorated.

The Legislature when permitting the regulation by contract of a certain class and type of identified goods only so long as they are being purchased for resale in

trade, the goods being free as soon as any trader wishes to close them out, is not enacting a statute fixing the alienation rights of property in general. Defendant seeks to free himself, not his goods. He wants to sell at close-out prices while continuing to buy new supplies of Factor goods for resale at cut prices.

These identified Factor goods can have only one price in the same market at the same time. The lowest price is the highest a buyer will pay in that market at that time. Defendant wants to fix that price by his individual caprice. The Legislature authorizes the price to be fixed by voluntary contracts between the producers and dealers in a competitive market and the Legislature decrees that such contracts shall be protected against nullification by strangers. The Legislature has the same power to decree that prices may be determined by vertical contracts in a competitive market and with protective safeguards to prevent nullification of the contracts as it has to decree that prices shall be determined by capricious individual action.

The Fair Trade Act is not a price-fixing act and if it be construed as one it still is not repugnant to the Federal Constitution.

Defendant admits by his demurrer that he possesses some of plaintiffs' trademarked products and has sold and is selling the same below the prices set for such products in contracts between plaintiffs and their regular dealers.

Defendant contends that plaintiffs and their contracting dealers under the Fair Trade Act are setting prices which defendant must abide by and that this

(a) is a price fixing scheme and

(b) deprives defendant of his right and privilege to do with his own as he wishes.

The constitution does not prohibit price-fixing in businesses which are affected with a public interest.

Munn v. *Illinois*, 94 U. S. 113, 24 L. Ed. 77;
Nebbia v. *New York*, 291 U. S. 502, 54 Sup. Ct. 505, wherein Mr. Justice ROBERTS stated:

"The Constitution does not guarantee the unrestricted right to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited and the right to conduct a business or to pursue a calling may be conditioned * * *. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency (citing many authorities).

"Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination" (citing statutes and authorities).

Plaintiffs' prices are set by voluntary contracts made with its dealers in a competitive market. If Max Factor products are priced too high the public can turn to competitive trademarked products or even to unbranded goods.

But the statute, being a trade act, does not force defendant to abide by prices set by plaintiffs under their contract plan. Defendant can always close out his entire line at any price he wishes to charge. This case concerns not defendant's full control over property he owns and wants to sell without dictation, but merely defendant's al-

leged right to continue day in and day out, year in and year out, a cut-rate business in nullification of the contracts between plaintiffs and their dealers.

Plaintiff demurs to defendant's demurrer. Defendant can lawfully close out his stock of goods at any time at any price he pleases to charge.

No fight lies there.

The question is—does the constitution guarantee to plaintiffs a vested right to continue a cut-rate business in appellee's branded goods without being guilty of unfair competition and does the Federal Constitution inhibit the Legislature from decreeing that prices on identified goods shall be determined by competition *between producers* rather than between distributors?

The legislature evidently thinks that competition concerned with trademarked or identified goods is better between producer and producer and regulated by voluntary contracts between producer and dealers, than by capricious and individual action of the dealers. The Legislature evidently regards protected-contract-price maintenance as a competitive check upon agency, combination or boycott price maintenance.

It is just as fair and lawful to stabilize prices for branded goods in a competitive market by protected contracts as by agencies, consignments, chains and refusal of sales. Especially are the contracts better because the goods can be freed by close out, damaged goods or court order sales.

Plaintiffs by setting up their own wholesale depots and refusing to sell goods to price-cutters can lawfully project their control over goods as to which they have already parted with title.

If plaintiffs can do that without violating the constitution, the legislature can empower them to part with title to their branded goods subject to a price restriction as to future sales while in the ordinary channels of trade without violating the constitution. The constitution looks to the substance of the thing rather than to forms.

If plaintiffs can lawfully maintain prices on their branded goods by a combination of twenty-one thousand sales agents without transfer of title, they should be permitted to combine the same twenty-one thousand dealers with the same prices set up by contract.

When the public buys a Mazda lamp it does not know or care whether title passed or not while the article was in trade channels. The only difference is that when title does not pass in trade transfers, the public has to pay for a more expensive and more discriminatory method of doing business than when title does pass.

The Act in question instead of being capricious and discriminatory has sought to prevent discriminations which now exist in intrastate and interstate trade because concerns of large capital can prevent price-cutting on their goods by means of lawful but expensive agencies, consignments, refusal of sales and chain systems; while small concerns cannot use the more democratic system of protected vertical resale contracts.

From the standpoint of public, trade and legislature, the only difference between price maintenance based on retention of title or consignment systems and protected contract systems is wholly in favor of the latter.

An undue emphasis on price maintenance based on retention of title or projection of control after title has passed by refusal of further sales, has turned out to be a policy which fosters monopoly.

The Fourteenth Amendment does not inhibit the State from legalizing price maintenance based on vertical contracts with passage of title permitted and adequate protection afforded against damage by strangers, as a competitive check upon already lawful systems of price maintenance based on consignments, agencies or refusal of continuing sales, by declaring in effect that trademarked articles belong under the exception to the rule against alienation and may be sold or transferred with a valid restriction upon prices while in the ordinary channels of trade, such valid contracts being protected against damage for nullification by non-confirmist traders under well-known equitable and police principles.

Section 1 ½ is the heart of the act. If that is killed the whole act dies. If the contracts are good (and their validity is not questioned) Section 1 ½ is a reasonable and ordinary means for their protection. If Section 1 ½ is bad, the contracts are no good to anyone at any time, whether valid or not.

Why did the General Electric Company raise the many millions of dollars necessary to stock twenty-one thousand or more dealers all over the United States with Mazda lamps title to which was retained until a consumer sale was made? They assumed this monumental burden merely to keep one or two price-cutters in each market from getting any lamps. One bad oyster spoils a stew and one price-cutter makes a whole market sour.

Why did the great shirt and collar companies raise the vast sums required to retain title to their trademarked products at wholesale in every important market in the country? They did it so as to project their control over all the goods they had already sold and on which title had already passed to retailers. They supplied retailers on a hand-to-mouth basis so that one who cut a price today would be out of stock tomorrow. In short, the potential menace of one price-cutter in each market robbed the formerly independent wholesalers of the business they had formerly done in these important trademarked goods.

Both the General Electric Company and the shirt and collar people took up these gigantic bows which no little producer could bend, because this honorable court, in the case of *Dr. Miles Medicine Company* v. *Miles, supra,* said to them that if title to their goods passd, they were restrainers of trade but if the title did not pass they were not restrainers of trade. This court freed the goods from contract restrictions and thereby enslaved the formerly independent retailers who became hired, regimented agents charging dictated prices for goods they did now own.

What social, economic or legal gain was that? What price does the public pay when it forces the unwilling Electric Company to continue to own millions of Mazda lamps all over this vast country, merely to prevent one or more price-cutters in each market from getting any of the goods? Independent wholesalers and retailers would gladly purchase these goods under price restriction contracts if permitted and protected against unfair competition.

These two instances are graphic evidences of the fact that Section 1½ is the heart of the Fair Trade Act. If price cutters could lawfully get hold of Mazda lamps to sell at

cut prices, the whole agency or consignment plan of price protection would collapse and be abandoned. If price cutters can sell the same goods at lower prices, the contracts are nullified and fall. When a price-cutter marks down a trademarked article on his own shelf, he marks down the same article on the shelves of all his competitors.

For the court to hold that the contracts are good in California (and the appeal concedes this) but that, constitutionally speaking, they cannot be protected against non-contract nullifiers, is to say that the body may live but the heart must die. It is to say that the *Miles-Park* rule, grounded in common law principles of alienation, shall be embalmed in the Constitution and become alterable only by constitutional amendment.

It makes no difference whether the result is reached by holding the contracts themselves to be invalid, as the court did in *Miles* v. *Park, supra,* or by holding that the contracts are valid but that they cannot be protected, in view of the 14th Amendment, against nullification by strangers, as the defendant argues here, the effect is the same in either case.

If the court shall hold that Section 1½ of the California Act is unconstitutional, the pernicious doctrine that prices may be stabilized by agency, chain-outlet, refusal of sale and other plutocratic combinations, but that the same result cannot be reached by democratic protected contracts, will become embedded in the 14th Amendment and the Sherman Anti-Trust Act will become a legal monstrosity—the father rather than the destroyer of trusts—the protector of the rich and a juggernaut crushing out small, independent producers, wholesalers and retailers.

Other producers besides the General Electric Company may lawfully make incandescent electric bulbs, but they

can get no distribution unless they protect their dealers against price-cutters. That means that unless Section 1½ of the Act in question is sustained, little producers cannot operate without having to supplement their manufacturing capital with unprocurable sums of distributing capital. To laden production with the burden of vast capital necessary for distribution without sale or transfer of title is in effect to deliver production over as a monopoly of the wealthy; to create an Aladdin's Cave to which only those of the Midas class have Open Sesame.

It is this mistaken policy which has helped to convert a minimum capital country with its small independent producing and distributing units into the maximum capital country it has become since loss-leader price-cutting became legalized and rampant.

The Legislature of California believes that the Act in question will tend to turn the tide of maximum capital economy—of giant combines—back toward the former days of minimum capital economy based on small independent, competitive producers and dealers each performing its own function as producer or distributor—each living and letting others live.

It would be interesting to speculate when and how anything could ever have gotten into the Federal Constitution that could possibly prevent the Legislature of California from declaring that contracts shall be both free and inviolate from destruction by selfish strangers—by knaves operating for ulterior purposes as Mr. Justice HOLMES phrased it in his dissent in the *Miles-Park* case.

Surely a country whose Constitution upholds the right of Goliath to have his spear but prohibits David to have his slingshot is heading away from democracy toward what Mr.

Justice HOLMES in *Miles* v. *Park, supra,* so prophetically described as "perilous country".

The judgment appealed from should be affirmed.

Respectfully submitted,

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CPY2321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 79.

CLARENCE G. KUNSMAN,

Appellant,

vs.

MAX FACTOR & CO., A CORPORATION, AND SALES BUILDERS, INC., A CORPORATION,

Appellees.

BRIEF FILED ON BEHALF OF THE OHIO STATE PHARMACEUTICAL ASSOCIATION, AMICUS CURIÆ.

Although we are convinced that the Legislature of Ohio had full power to enact the Fair Trade Statute, and that the same is a valid enactment, it is not intended in this brief memoranda to discuss the constitutionality

of such statutes, but merely to acquaint the court with the conditions as they exist in Ohio relative to such legislation and to point out the reasons for its enactment and the results of its operation.

Ohio has about twenty-five manufacturers, fifteen wholesalers or jobbers, and thirty-eight hundred retailers dealing in drug articles of standard quality bearing a trade-mark, brand or name.

In addition, there are great numbers of manufacturers and dealers in such articles located outside of Ohio, but doing business with respect thereto in Ohio. The state is thickly populated, having a number of cities ranging from forty thousand to one million in population and innumerable towns, villages and cities of smaller population. Articles of standard quality bearing a trade-mark, brand or name, the value and good will of which have been established by large expenditures on the part of manufacturers and jobbers, are sold by all druggists in the state and, as well, by numerous department stores. There are many chain drug stores in the state with branches in all important centers and in many of the smaller towns. Throughout the state are approximately twenty-six hundred independent drug stores, located in neighborhoods where they are convenient to patrons and, in fact, where they are necessary for the health and welfare of the people of such communities. These independent stores, as a rule, while doing a small volume of business compared with the larger stores, are still able to make a reasonable profit for their owners, if they are not destroyed by cut price competition.

During the last few years, the smaller independent stores of the state have been greatly crippled by reason of competition of the chain stores and the larger independent drug stores, principally by means of competition of articles known as "loss leaders," on which prices have been cut, with the result that many of such independent stores have been unable to make a profit and, in many instances, have been entirely driven out of business. This has brought financial disaster to their owners and great inconvenience and positive injury to the neighborhoods where people have been accustomed to depend upon such stores for drugs and medicines which they need.

By the practice of price cutting on standard articles, customers, particularly those of independently operated stores, are decoyed into stores of the price cutters, with the purpose on the part of the price cutters of persuading and inducing such people not to buy the so-called "loss leaders," which frequently they are "just out of," but other articles, the prices of which may be regulated so as to take up the loss on the particular standard articles offered and sold reluctantly, if at all, at the cut prices.

This conduct has adversely affected the manufacturer and producer whose actual market is, after all, the ultimate consumers. A normal course of business could not be maintained because producers could not be assured of even and continuous distribution of their goods. The public lost confidence in excellent goods when the low prices were published and observed. Hence, the reputa-

tion and good will of the manufacturers in such products have been injured, if not destroyed.

The jobber or wholesaler has been likewise affected.

The retailer has been unable or unwilling to provide and maintain a necessary stock in well-known standard brand products because any day, in his locality, one of the cut price merchants, if only for a week or two at a time, might reduce the price on such standard brands, so that those on the shelves of the man desiring to trade fairly could not be sold. In addition, his customers, attracted by the price cut merchandise, have purchased other goods at the stores to which they have been induced to go by low prices on certain brands. Furthermore, customers have been led to buy inferior goods, believing them to be bargains.

Radio and newspaper advertising of cut prices, and good roads, have induced people living in smaller towns to visit the larger places for shopping. Furthermore, chain stores have been entering the smaller towns and even neighborhoods in cities and towns having independent neighborhood drug stores.

These conditions have taken away all incentive for younger men to become pharmacists and to open their own stores, when they know that by the method of price cutting they will not be able to remain in business.

Proprietors of independent stores have been required to work long hours because of inability to employ help and because they are required by the law to have a registered pharmacist in attendance at all times.

As a result of these conditions, many storerooms throughout the state are vacant, which would otherwise have been occupied, and tax duplicates have been lowered.

Manufacturers have tried to stop price cutting by appealing to retailers, but without avail. Prices cannot be controlled by contract or exclusive privilege because of the necessity of mass selling to numerous dealers.

Briefly, this was the situation in Ohio when the Legislature, after receiving a special message on the subject from the governor (see Appendix), who recognized the necessity of correcting the evils above mentioned, enacted what is known as House Bill No. 609, the same being an Act "To protect trade-mark owners, distributors and the general public against injurious and uneconomic practices in the distribution of articles of standard quality bearing a trade-mark, brand or name."

A true copy of this Act appears in the Appendix.

This law became effective July 9, 1936. Immediately, through the offices of The Ohio State Pharmaceutical Association, all retail druggists, chain stores and department stores handling the articles described in the Act were given notice of the provisions of the law and were urged to observe it.

Although it has been in operation but a few months, the beneficent effects of the law are already apparent. Independent retailers know and understand that their business cannot be destroyed by wicked and cutthroat competition, which is not only unfair to them, but which may be generally characterized as a fraud on the consuming public. But a few attempts to violate the law have appeared. Many of these were the result of ignorance as to the requirements of the statute and when the at-

tention of violators has been called to the law, the price cutting, almost without exception, has been stopped. It is believed that as a result of this Act, many independent dealers who have been put out of business by predatory price cutting, will again engage in industry, knowing that they will not be attacked by groups who have succeeded in dominating an industry and in destroying legitimate trade by cutting prices on standard articles.

It was the opinion of the Legislature that the Ohio Fair Trade Law is definitely in the interest of the producer, distributor and the consumer alike; that price cutting practiced under the "loss leader" theory not only destroyed competition, but tended to restrain trade, create monopolies in the business of those who practiced it, brought about lower wages, longer hours, coercion of independent manufacturers, wholesalers and retailers and, finally, higher prices to consumers on other articles that people must buy, whereby the losses on the standard brands were made up.

It was to remedy these evils that the Ohio Fair Trade Law was enacted. The people of the state of Ohio are interested in having it preserved. The short experience during the operation of the law has already shown great benefits to the people of the state. It is for these reasons that it has been deemed advisable to bring the Ohio legislation to the attention of the court.

Respectfully submitted,

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APPENDIX.

(House Bill No. 609.)

An Act

To protect trade-mark owners, distributors and the general public against injurious and uneconomical practices in the distribution of articles of standard quality bearing a trade-mark, brand or name.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. The purpose of this act is to promote the public welfare by protecting the general public, trade-mark owners and distributors against injurious and uneconomic practices in the distribution of articles of standard quality bearing a trade-mark, brand or name.

SECTION 2. No contract relating to the sale or resale of a commodity which bears, or the label or container or content of which bears, the trade-mark, brand, or name of the producer or of the owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of Ohio by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the vendor.

(b) That the vendee or producer require any person to whom he may resell such commodity to agree that he

will not, in turn, resell such commodity at less than the minimum price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply provisions that such commodity may be resold, without reference to such agreement, in the following cases:

(a) When closing out the owner's stock for the purpose of discontinuing delivery of any such commodity, provided, however, that such stock is first offered to the manufacturer of such stock, or his duly authorized agent, at the prevailing invoice stock price, at least ten (10) days before such stock shall be offered for sale to the public.

(b) When the commodity is damaged or deteriorated in quality and proper notice thereof is given to the public.

(c) When the commodity is sold by the order of any court of record.

SECTION 3. Whoever knowingly and wilfully advertises, offers for sale or sells any commodity at less than the minimum price stipulated in any contract entered into pursuant to the provisions of Section 2 of this act, whether said person so advertising, offering for sale or selling such commodity is or is not a party to such contract shall be deemed guilty of engaging in unfair competition and unfair trade practices and is actionable at the suit of any person damaged thereby.

SECTION 4. Any person violating the provisions of this act shall be liable at the suit of any other retailer of such commodity or at the suit of any other person or per-

sons injured thereby, including the producer of such commodity, which suit may be for an injunction against such practice.

SECTION 5. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

SECTION 6. As used in this act unless otherwise expressly stated, or unless the context or subject matter otherwise requires:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce bearing a trade-mark, brand or name.

"Trade-mark", "brand" or "name" means any form, symbol or name appropriated by any person, as herein defined, who produces or owns or in any manner deals in a commodity, to designate the origin of ownership thereof.

"Person" includes individuals, partnerships, corporations, and any other business unit and/or receiver, trustee or assignee of such business units.

SECTION 7. If any clause, sentence, paragraph or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof but shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered. No provision of this act shall apply or be construed to apply to foreign or interstate commerce,

except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto.

SECTION 8. As of the effective date of this act, Sections 6390 to 6402-1, inclusive, of the General Code, shall not apply to contracts entered into, or proceedings instituted, pursuant to the provisions of this act.

J. Freer Bittinger,
Speaker of the House of Representatives.
Paul P. Yoder,
President pro tem. of the Senate.

Passed March 26, 1936.
Approved April 7, 1936.
Martin L. Davey,
Governor.

Filed in the office of the Secretary of State at Columbus, Ohio, on the ninth day of April, A. D. 1936.

I hereby certify that the foregoing is a true copy of the engrossed bill.

George S. Myers,
Secretary of State.

Governor's Office: December 10, 1935.

To the Members of the Ninety-first General Assembly in Special Session:

Under date of September 12, 1935, a proclamation was issued by me, calling a special session of the 91st General Assembly of the State of Ohio for 1:30 p. m., on Wednesday, September 18, 1935, for the purpose of considering certain legislation as set forth in said proclamation. I

am by this message authorizing the General Assembly to consider matters other than those named in the proclamation.

It has been brought to my attention by manufacturers, wholesalers and retailers of many articles of merchandise bearing a trade-mark, brand or name, that certain injurious, uneconomic practices in the distribution of such articles, have threatened destruction of the value of such trade-mark, brand or name.

It has further come to my attention that various interested persons engaged in the production, distribution and sale of such trade-marked articles have spent a great deal of time and effort in the preparation of legislation to remedy this condition. Legislation has been prepared which would authorize a manufacturer or producer of a commodity which bears his trade-mark, brand or name, and which is sold in fair and open competition with the commodities of the same general class produced by others, to make a contract with a retailer not to sell such commodity except at the price stipulated by the manufacturer or producer. The proposed legislation is in no way a general price-fixing act. Under no condition, does it authorize a contract or agreement between manufacturers and producers or between wholesalers or between retailers as to the sale or resale prices of any commodity. The suggested legislation is merely permissive, and would authorize a manufacturer or producer to enter into contracts for the maintenance of his prices, but it does not compel him to do so.

It seems to me to be sound economy to devise a method whereby a manufacturer or producer may protect himself against undue slashing of the price of his product, and consequent destruction of the value of his trade-mark and good will, and with unnecessary loss to others.

I believe that this proposed legislation will protect the small independent merchant and retailer in business. It should offer some protection against devastating cut-price practices, such as the ruthless method of loss leader articles. It will also serve to discourage falsification and adulteration of commodities. Similar legislation has already been enacted in the States of New York, New Jersey, California, Wisconsin, Illinois, Iowa, Washington, Oregon, Maryland, and is now under consideration in the states of Colorado, Indiana, Massachusetts, Missouri, Oklahoma, Tennessee, Texas and West Virginia.

After considerable study and consideration of the proposed legislation, I believe it to be in the general public interest, and that it should be placed on our statute books.

I therefore suggest to the 91st General Assembly in special session that legislation be enacted that will protect trade-mark owners, distributors, and the general public against injurious and uneconomic practices in the distribution of articles of standard quality bearing a trade-mark, brand or name.

Martin L. Davey,
Governor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 79.

CLARENCE G. KUNSMAN,
Appellant,

vs.

MAX FACTOR & COMPANY AND SALES BUILDERS, INC.,
Appellees.

BRIEF FOR NATIONAL ASSOCIATION OF RETAIL DRUGGISTS, AMICUS CURIAE.

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The Daily Record Co. Print, Baltimore.

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MAX FACTOR & COMPANY AND SALES BUILDERS, INC.,
Appellees.

BRIEF FOR NATIONAL ASSOCIATION OF RETAIL DRUGGISTS, AMICUS CURIAE.

The National Association of Retail Druggists, on whose behalf this brief is filed, has a membership of more than 22,000 independent retail druggists.

It is a national organization, affiliated with state and county groups having an aggregate membership in excess of 50,000.*

The California Fair Trade Act of 1931 (*California Statutes*, 1931, c. 278), legalizing vertical resale price

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* See Appendix.

maintenance contracts relating to branded commodities, and the 1933 amendment (*California Statutes,* 1933, c. 260), here challenged, whereby a remedy is given for the protection of such contracts from nullification by strangers, are undoubtedly of the utmost importance to producers of trade-marked and otherwise identified merchandise, as set forth in the appellees' brief. But this type of legislation also serves to preserve and maintain the integrity of the retail structure, and is of particular importance to the independent retail druggist.

Today, legislation identical with that now before this Court (or substantially similar thereto) is in effect in fourteen states*, having an aggregate population of more than one-half of the population of the whole country.

Because of the vital interest in this legislation of so many of its members, the National Association of Retail Druggists has applied for leave to file this brief as *amicus curiae* in support of its validity.

The legal arguments so ably presented in the briefs heretofore filed in support of the constitutionality of the Act will not be repeated. The discussion will be limited to a brief statement of: (a) the effect of price-cutting of branded commodities on the independent retail druggist; and (b) the propriety and reasonableness of the statutory method here in question of correcting the evils of such price-cutting.

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* In addition to California: Oregon, Washington, Iowa, Wisconsin, Illinois, New York, New Jersey, Pennsylvania, Maryland, Virginia, Ohio, Louisiana and Rhode Island.

(a) THE EFFECT OF PRICE-CUTTING OF BRANDED COMMODITIES ON THE INDEPENDENT RETAIL DRUGGIST.

The druggist is more than a mere merchant. He renders an important medical service. In addition he has become the distributor of many products of which he is not the producer. The competition in his field of the chain drug store and other types of price-cutter has far-reaching social implications. It tends to eliminate the indispensible 24-hour neighborhood service of the pharmacist. It tends to over-emphasize the commercial side of his business at the expense of the essential professional service which he renders.

Unfortunately, the chain store and other types of price-cutters have been singularly successful in their competition with the small, neighborhood, one-store druggist. There are two reasons for this: First, the number of branded commodities distributed by the druggist has grown to unusual proportions; and secondly, the kind of branded commodity in which he deals is well adapted to price-cutting.

The Bureau of Foreign and Domestic Commerce authorizes the statement, based on its National Drug Store Survey conducted in St. Louis and vicinity in 1931, that the trade-marked and otherwise identified articles distributed through drug stores constitute 65% of sales, based on dollar volume, and based on item volume, would run much higher. The records and commodity classification cards upon which these percentages are based are on file in the Marketing Research Division of the Bureau of Foreign and Domestic Commerce.

Such commodities lend themselves to price-cutting, because they are well-known, inexpensive, relatively safe, and generally used.

As a result of the large number and peculiar adaptability to price-cutting of the branded commodities sold in drug stores, the practice has had a disastrous effect on the independent retail druggist.

The startling decline in the business of the independent retail druggist and the correlative increase in the business of the chains will appear from the following comparison of their total sales for the years 1929 and 1933, taken from the *Fifteenth Census of the United States* (1930), *Distribution, Volume I, Retail Distribution, Part I* (page 71, table 6) and the *Census of American Business for* 1933, *Retail Distribution, Drug Retailing, Including Drug Store Chains,* issued by the United States Department of Commerce, Bureau of the Census (pp. 4, 5 and 6):

NUMBER OF STORES.

Year	*Total No. of Stores*	*No. of Independents*	*% of Independents*	*No. of Chain Stores*	*% of Chain Stores*
1929	58,258	54,732	93.9	3526	6.1
1933	58,407	54,641	93.6	3766	6.4

SALES.

Year	*Total Sales*	*Average Sales Per Store*	*Average Sales of Independents*	*% Sales of Independents*	*Average Sales of Chain Stores*	*% Sales of Chain Stores*
1929	1,690,398,682	29,016	25,195	81.5	88,320	18.5
1933	1,066,252,000	18,256	14,622	74.9	70,976	25.1

The general decline in total sales was 37%, but the average decline in the independently owned stores was 42%, whereas, in the chain stores, it was only 14.2%.

It is significant also that while the total sales in chain stores declined 14.2% during this period, the percentage of total sales increased from 18.5% to 25.1%.

The depression may account for the decline in the total sales but there is a widespread belief that the difference in its relative effect must be attributed to the price-cutting of branded goods.

In the recently completed report entitled "*Restriction Of Retail Price-Cutting With Emphasis On The Drug Industry*" (March, 1936) issued by the Division of Review of the National Recovery Administration, the situation in the drug trade during the depression is described as follows (p. 233):

> "One misinterprets the quality of the demands for resale price control as far as retailers are concerned when the problem is approached merely as a depression phenomenon for its roots lie earlier and rest more deeply. However, the relative intensity and vigor of the demands and the type of economic theorizing which arose to rationalize these demands are intimately linked with the deep and lengthened business slump. The origins of the outcry for resale price maintenance in the drug trade are found in the conditions of the last quarter of the preceding century when branded proprietary drug products and large scale advertising intruded into the drug and chemical business in a large scale fashion, as well as in the normally intense nature of competition in the retail business. But it was the dominant price emphasis of the depression and the shift of consumers towards firms that actually or allegedly sold at cut rates that brought the issue to its legislative and trade focus."

The report from which the above quotation is taken covers the historical background of the movement to correct the evils of price-cutting and loss leader selling from its inception to the present time.

It reviews the legislative proposals and enactments and the results of the price-stabilization systems in operation. It contains significant evidence of the effect upon competition of compulsory vertical resale price maintenance of branded commodities. It shows that where such price maintenance prevails, the forces of the market compel the establishment of a reasonable price to the consumer. Producers whose products, in the absence of price maintenance, are sold at cut prices, find that where the resale prices are subsequently stabilized at a figure substantially in excess of the cut price, consumer resistance results and creates a shift in business to competing products. To offset this trend and maintain and increase their volume, they have no alternative but to reduce prices to the distributor so that the distributor's resale prices can in turn be reduced to meet the competition. The distributor's zeal for volume is no less than the producer's. He too is stimulated by the same consideration to advance the sale of lower priced competing goods. Thus competition among dealers is preserved by competition among rival producers. The net result of these forces of competition is that the dealer is compelled to establish a reasonable resale price and consumer prices of all commodities of the same class are reduced without loss to the distributor.

There is therefore a factual and logical basis for the claim made by the title of the Act in question that it pro-

tects "trade mark owners, distributors and the public," and the conclusion may rationally be drawn that these results are accomplished by intensifying competition among producers without eliminating it among distributors.

The report also deals particularly with the operation and effect of the California Fair Trade Act. And while the Act has been in operation too short a time to reveal its full effects, the report shows that there is substantial evidence that the Act accomplishes its objectives, that is to say, it protects the producers and distributors of branded commodities from the evil effects of price-cutting without raising the level of consumer prices.

In the light of the experience of the independent retail druggist, both with price-cutting and with vertical resale price maintenance as a corrective of the alleged evils of price-cutting, there would seem to be ample economic justification for the declaration of public policy expressed in Section 1 of the California Fair Trade Act.

The legislature of California has decided that price-cutting of branded commodities is a weapon which has been effectively used by the strong to crush the weak, thereby tending to monopoly; and that the legalization of vertical resale price maintenance contracts is an effective method of controlling this "injurious and uneconomic" practice.

There is dispute both as to the effect of the practice and the effectiveness of the remedy, but there is adequate authority and factual support for the legislative policy adopted.

There is no dispute, however, that where the proper choice of economic policy is controversial, it is the function of the legislature, not of the courts, to make the decision.

There is also no dispute that the legislature having found that price-cutting is an evil, the legislative purpose to correct the evil is legitimate and the power to accomplish it exists.

And finally, there is no dispute that the legalizing of vertical resale price maintenance contracts is legally and constitutionally unobjectionable.

It is objected, however, that the means selected by Section 1½ of the Act to protect such contracts from nullification by strangers have no real and substantial relation to the object sought to be attained and are unreasonable, arbitrary and capricious. The basis of the objection is that the Act is in effect a price-fixing statute and as such unnecessarily and unreasonably restrains competition.

(b) SECTION 1½ OF THE ACT IS NOT A PRICE-FIXING STATUTE. IT DOES NOT RESTRAIN COMPETITION. IT DOES NOT INTERFERE WITH THE PROPERTY RIGHTS OR PERSONAL LIBERTY OF THE DEFENDANT IN THIS CASE. IT MERELY PROVIDES A PROPER AND REASONABLE REMEDY FOR PROTECTING THE PLAINTIFFS AND THOSE WHO HAVE CONTRACTED WITH THEM PURSUANT TO SECTION 1 OF THE ACT FROM WILFUL INTERFERENCE WITH THEIR CONTRACTS AND IN THE ENJOYMENT OF THE BENEFITS THEREFROM.

The question in this case is not affected by the decision in *Dr. Miles Medical Co. vs. John D. Park & Sons,* 220 U. S. 373, because here the California legislature has ex-

pressly declared that resale price maintenance contracts relating to branded commodities are not in restraint of trade, but that, on the contrary, price-cutting where such contracts exist is an "injurious and uneconomic" practice. There, the court stated that the required specific declaration of legislative policy was lacking.

Nor is this case controlled by the decisions relating to statutory price-fixing, because no governmental price-fixing is involved.

Price-fixing statutes which this court has considered invariably have related to all in a particular industry or all of a particular commodity, for instance: milk (*Nebbia vs. New York,* 291 U. S. 502), or dairy products (*Fairmont Creamery Company vs. Minnesota,* 274 U. S. 1), or ice (*New State Ice Co. vs. Liebmann,* 285 U. S. 262), or gasoline (*Williams vs. Standard Oil Co.,* 278 U. S. 235), or selling theatre tickets (*Tyson vs. Banton,* 273 U. S. 418), or the business of employment agencies (*Ribnik vs. McBride,* 277 U. S. 350).

Under those statutes, once the price of gasoline or ice was fixed, all dealers in the commodity were inexorably bound. The commodity affected could not be sold except at the established price. The statute was compulsory in its operation. Competition was destroyed.

Under the statute here in question: (1) if no resale price contract is entered into, the statute is inapplicable; (2) competition among distributors is not eliminated because if branded articles are made subject to resale price maintenance contract, the dealer is free to handle competitive unbranded articles or competitive branded arti-

cles not subject to price restriction; (3) competition between producers is in no way lessened; and (4) the price to the consumer is determined by the forces of the market. The Act merely gives the producer some measure of control of his retail outlets. He is not relieved of the competitive threat of rival producers and of competition with unbranded goods.

In other words, if Max Factor lipstick is subject to resale price maintenance contract, and the dealer is unwilling to abide by the price restriction, he has the alternative of dealing in any other brand of lipstick, either not subject to price restriction or subject to price restriction satisfactory to him, or he can deal in unbranded lipstick, or lipstick under his own trade mark or trade name and sell it at whatever price he may please. Or, by express provision of the statute, if he decides at any time to discontinue dealing in goods subject to the price restriction, he can close them out at any price. And he has the same privilege if he is first apprised of the price restriction after he acquires the goods.

Moreover, there is nothing in the Act which prevents a dealer from selling a commodity which is subject to price restriction at any price he chooses, provided he detaches, removes or obliterates the trade mark, brand or name of the producer. His liberty to deal with the physical property is, therefore, entirely unaffected.

No similar alternatives were afforded the dealer under the laws regulating the price of ice or dairy products or the other commodities in the cases above cited. If he elected to deal in any kind or quality of the regulated commodity, he had to conform to the requirement of the

law. He was required either to abide by the established price or to discontinue to deal. And if he failed to abide, he was subject to drastic penalties.

It is not disputed that the owner of the trade mark or trade name can lawfully refuse to sell his goods unless the purchaser maintains the resale price which he establishes, and, under Section 1 of the California Act, can also lawfully require his contracting dealers to agree not to sell to any one who will not conform to the stipulated price.

He has the legal right thus to prevent those who will not conform from acquiring his goods for resale.

One who, with knowledge of the price restriction, purchases the goods for resale without restriction as to price, thereby insists that the Fourteenth Amendment gives him the right to acquire indirectly that which the law denies him the right to acquire directly, namely, the right to traffic in the good will of the owner of the trade mark to the damage of such owner and those with whom he has lawfully contracted.

The statute does not restrict free competition any more than the agency system of resale price maintenance approved by this court in *U. S. vs. General Electric Co.*, 272 U. S. 476. It merely gives a right of action for damages resulting from the unauthorized use of the good will associated with trade marks and trade names, when the unauthorized user knows of his lack of authority and nevertheless deliberately persists in the unauthorized use.

The non-contracting party's right to deal in competitive commodities of the same class is not affected, and at the same time, the property rights of the owner of the good will associated with a trade mark or trade name are also preserved. And the property rights of the dealers who have acquired the right to use that good will by agreeing with the owner to maintain the resale price are likewise protected.

Whether the price-cutting involved may be characterized as predatory or merely in violation of the contractual restriction imposed by the owner of the good will, those who wilfully and knowingly indulge in it are guilty of a deliberate trespass upon the rights and property of the owner of the good will and the distributive outlets with whom he has lawfully contracted. A trespasser should not be heard to invoke the protective sanctions of the Constitution to aid him in his trespass. He is not deprived of any liberty or property entitled to protection under the Constitution.

There may be circumstances under which the application of the statute here in question may be inequitable. But they do not exist in this case. Here is a typical state of facts to which the statute was intended to and does apply. And this application is neither arbitrary nor unreasonable. On the contrary, as applied to the facts of this case, the statute serves a legitimate legislative purpose, which the legislature has the power to accomplish and the means selected have a real and substantial relation to the object sought to be attained and are entirely reasonable and appropriate for that purpose.

CONCLUSION.

There is nothing in the Federal or California Constitutions or in any of the cases cited by the appellant that says that competition among distributors of Max Factor's lipstick must be free and unrestrained. On the contrary, with or without specific legislative authority, Max Factor has a perfect right to establish a resale price for his product and eliminate competition in Max Factor's lipstick among his distributors either by adopting the agency system of distribution or by refusing to sell those who will not maintain his price. Why, then, is the legislature of the State of California powerless to give him an effective method of protecting this unquestioned right?

In all of the cases cited by the appellant in which the abridgement of the right of free competition has been alleged to be in violation of due process, there was an attempt to restrict all competition in a particular commodity or business. If the legislature of California attempted to regulate the price of all lipsticks or of all cosmetics, those cases would be applicable, because there would then be involved a general restraint of competition which must meet the requirements of due process.

It must be admitted:

(a) That the legislature of California has the power to legalize resale price maintenance contracts relating to branded commodities;

(b) That a corollary of the right to make such contracts is the right to refuse to sell unless the purchaser agrees to maintain the stipulated price;

(c) That sales by non-contracting parties at less than the contract price have a tendency to induce breaches of the contracts establishing the price;

(d) That sales by non-contracting parties at less than the contract price destroy the value of the contracts establishing the prices both to the contracting producers and distributors;

(e) That the California Act does not preclude non-contracting parties from competing with other branded or unbranded articles of the same general class;

(f) That the forces of the market, that is to say, the rivalry of competing producers and distributors, will make for the establishing of reasonable resale prices;

(g) That there is a widespread opinion, supported by evidence of a substantial character, that price-cutting of branded commodities tends to destroy the good will associated with the trade mark or trade name affixed to the goods, and also tends to foster monopoly; and

(h) That there is substantial evidence that compulsory price maintenance of branded commodities tends to reduce the level of prices of such articles to the consumer.

Once these admissions are made, as they must be, it follows that the deliberate violation by a non-contracting party of a contractual resale price restriction upon branded goods, when he is free to deal in similar competing goods without restriction or to discontinue to deal in, or to detach, remove or obliterate the trade mark, brand or name from, the restricted goods, and sell them

at any price he pleases, is nothing more than a malicious exploitation for his own benefit, and without regard to the rights of others, of the good will associated with the trade mark or trade name affixed to the restricted goods.

It is respectfully submitted that such exploitation is not the free competition which the Constitution is intended to safeguard. It is an unfair trade practice against which the legislature of California has full power to prescribe a civil remedy to protect those who may be damaged thereby.

Circumscribed as the statute is, the property rights and personal liberty of the defendant are fully preserved, and at the same time protection is afforded to the property rights of the plaintiffs and those with whom they have contracted.

The judgment of the Supreme Court of California should be affirmed.

Respectfully submitted,

HERBERT LEVY,

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APPENDIX.

The views expressed in the aforegoing brief are subscribed to and concurred in by the following associations:

Name of Association	*No. of Members*
Alabama Pharmaceutical Association	500
Allegheny Co. Retail Druggists Association	437
Arizona Pharmaceutical Association	400
Arkansas Pharmaceutical Association	679
Baltimore Retail Druggists Association	350
Boston Association of Retail Druggists, Inc.	510
California Pharmaceutical Association	3035
Chicago Retail Druggists' Association	1200
Colorado Pharmaceutical Association	900
Delaware Pharmaceutical Society	70
D. C. Pharmaceutical Association	145
Florida Pharmaceutical Association	582
Georgia Pharmaceutical Association	886
Idaho Pharmaceutical Association	196
Indiana Pharmaceutical Association	3607
Indianapolis Association of Retail Druggists	300
Iowa Pharmaceutical Association	4000
Kansas Pharmaceutical Association	1124
Maine Pharmaceutical Association	340
Maryland Pharmaceutical Association	450

Name of Association	*No. of Members*
Massachusetts State Pharmaceutical Association	1400
Minnesota State Pharmaceutical Association	1100
Mississippi State Pharmaceutical Association	600
Montana State Board of Pharmacy	350
New Hampshire Pharmaceutical Association	400
N. Y. County Pharmaceutical Society	154
N. Y. State Pharmaceutical Association	6840
North Carolina Pharmaceutical Association	985
North Dakota Pharmaceutical Association	601
Ohio State Pharmaceutical Association	982
Oregon State Pharmaceutical Association	400
Philadelphia Association of Retail Druggists	1600
Retail Druggists' Association of St. Louis	541
Rhode Island Pharmaceutical Association	397
South Carolina Pharmaceutical Association	640
South Dakota State Pharmaceutical Association	650
Tennessee Pharmaceutical Association	2250
Virginia Pharmaceutical Association	375
W. Va. State Pharmaceutical Association	400
Wisconsin Phrmaceutical Association	1011
Wyoming Pharmaceutical Association	196
Total	41583

SUPREME COURT OF THE UNITED STATES.

Nos. 55, 79.—October Term, 1936.

The Pep Boys, Manny, Moe & Jack of California, Appellants,		
55	*vs.*	
Pyroil Sales Company, Inc.		Appeals from the Supreme Court of the State of California.
Clarence G. Kunsman, Appellant,		
79	*vs.*	
Max Factor & Co., and Sales Builders, Inc.		

[December 7, 1936.]

Mr. Justice Sutherland delivered the opinion of the Court.

These appeals involve the question of the constitutionality of §§ 1 and 1½ of the California Fair Trade Act, as amended, Cal. Stat. 1931, p. 583, Cal. Stat. 1933, p. 793; Deering's Gen. Laws of California, 1931, vol. 3, Act 8782, printed in the margin.* It will be

*Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

Sec. 1½. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

seen upon comparison that they are substantially identical with §§ 1 and 2 of the Illinois act, which we have just sustained in *Old Dearborn Distributing Company* v. *Seagram-Distillers Corporation, ante* p.—.

In the present cases suits were brought by appellees against appellants to enjoin the latter from alleged violations of § 1½. The sufficiency of the complaints was challenged by demurrer, the facts alleged being, therefore, admitted. The trial courts, upon these facts, held the section invalid, and appeals were taken to the state supreme court. In that court, No. 79 was first heard; the view of the trial courts was rejected; and the section held to be constitutionally valid. 5 Cal. (2d) 446. Upon the authority of that decision, No. 55 was also reversed. 5 Cal. (2d) 784. The decrees of the trial courts entered on the orders sustaining demurrers without leave to amend were reversed; and respondents (appellants here), having elected to stand on their demurrers, the trial courts were ordered to enter judgment in favor of appellants (appellees here), as prayed for in their complaints.

The questions presented and the facts involved are substantially the same as those which were present in the two suits involved in the *Old Dearborn Distributing Company* case; and upon that authority, the decrees entered in the court below are

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.